(33,872)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 563

THE BALTIMORE AND OHIO RAILROAD COMPANY, WILLIAM W. WHEELOCK, AND WILLIAM G. BIERD, RECEIVERS, ETC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

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IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity

THE BALTIMORE AND OHIO RAILROAD COMPANY; WILLIAM W. Wheelock and William G. Bierd, Receivers of the Chicago and Alton Railroad Company; Chicago and Eastern Illinois Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Illinois Traction, Inc., Illinois Central Railroad Company, Litchfield and Madison Railway Company, Louisville and Nashville Railroad Company, Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Southern Railroad Company, Wabash Railway Company, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Defendant

BILL OF COMPLAINT—Filed Nov. 12, 1926

To the Honorable the Judges of the District Court of the United States in and for the Eastern Division of the Northern District of Illinois:

I

The corporate names of the plaintiffs herein, their citizenship, and the places of their principal offices, are as follows:

The Baltimore and Ohio Railroad Company, a corporation of Maryland, Baltimore, Maryland;

William W. Wheelock and William G. Bierd, Receivers of the railways and property of the Chicago and Alton Railroad Company, citizens and residents of the State of Illinois, Chicago, Illinois;

Chicago and Eastern Illinois Railway Company, a corporation of Illinois, Chicago, Illinois;
{fol. 2} The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, a corporation of Ohio and Indiana, Cincinnati, Ohio;
Illinois Central Railroad Company, a corporation of Illinois, Chicago, Illinois;
Illinois Traction, Inc., a corporation of Illinois, Monticello, Illinois;
Litchfield and Madison Railway Company, a corporation of Illinois, Edwardsville, Illinois;
Louisville and Nashville Railroad Company, a corporation of Kentucky, Louisville, Kentucky;
Mobile and Ohio Railroad Company, a corporation of Alabama, Mobile, Alabama;
The New York, Chicago and St. Louis Railroad Company, a corporation of New York, Pennsylvania, Ohio, Indiana and Illinois, Cleveland, Ohio;
The Pennsylvania Railroad Company, a corporation of Pennsylvania, Philadelphia, Pennsylvania;
Southern Railway Company, a corporation of Virginia, Richmond, Virginia;
Wabash Railway Company, a corporation of Indiana, St. Louis, Missouri.

Plaintiffs herein are common carriers by railroad subject to the Interstate Commerce Act and bring this their bill of complaint in equity on behalf of themselves and on behalf of such other railroads as have an interest herein and may by proper proceedings become parties hereto.

II

The defendant is The United States of America, and this suit is brought under the Act of Congress, approved October 22, 1913, 38 Statutes at Large, page 219, for the purpose of having enjoined, set aside, annulled and suspended a certain order of the Interstate Commerce Commission entered on July 12, 1926, in Interstate Commerce Commission, Docket No. 16927, entitled The Chicago, Rock Island and Pacific Railway Copany, et al. v. The Baltimore and Ohio Railroad Company, et al., a copy of which order as corrected by the said Interstate Commerce Commission,

together with the corrected report in said cause referred to in and made a part of the said order, is attached to [fol. 3] this bill marked "Exhibit No. 1," and made a part hereof with like force and effect as if set forth in extenso herein. This order by its terms was required to be made effective on or before October 12, 1926, but by an order of the said Interstate Commerce Commission entered in the same cause on August 20, 1926, the effective date of the said order of July 12, 1926, was postponed to December 11, 1926. A copy of the said order of August 20, 1926, is attached to this bill marked "Exhibit No. 2," and made a part hereof with like force and effect as if set forth in extenso herein.

III

The said order of July 12, 1926, was entered in a proceeding instituted by The Chicago, Rock Island and Pacific Railway Company, the Missouri-Kansas-Texas Railroad Company, the Missouri Pacific Railway Company, and the St. Louis-San Francisco Railway Company, against the plaintiffs herein and other common carriers, which proceeding was docketed by the Interstate Commerce Commission under its Docket No. 16697. The said order relates to transportation.

Plaintiffs herein show that The Chicago, Rock Island and Pacific Railway Company is a railroad corporation organized under the laws of the States of Iowa and Illinois and has its principal office at Chicago, Illinois, and is a citizen and resident of the Northern District of the State of Illinois, Eastern Division; that the Missouri-Kansas-Texas Railroad Company is a railroad corporation organized under the laws of the State of Missouri and has its principal office at St. Louis, Missouri, and is a citizen and resident of the Eastern District of the State of Missouri; that the Missouri Pacific Railroad Company is a railroad corporation organized under the laws of the State of Missouri and has its principal office at St. Louis, Missouri, and is a citizen and resident of the Eastern District of the State of Missouri; that the Missouri Pacific Railroad Company is a railroad corporation organized under the laws of the State of Missouri and has its principal office at St. Louis, Missouri and is a citizen and resident of the Eastern

District of the State of Missouri; and that the St. Louis-San Francisco Railway Company is a railroad corporation organized under the laws of the State of Missouri and has its principal office at St. Louis, Missouri, and is a citizen and resident of the Eastern District in the State of Missouri.

[fol. 4] The said order of the Interstate Commerce Commission herein sought to be enjoined, set aside, annulled and suspended was made upon the petition of the above named railroads, one of which, the said The Chicago, Rock Island and Pacific Railway Company, is a railroad corporation organized under the laws of the States of Iowa and Illinois and has its principal office at Chicago, Illinois, and is a citizen and resident of the Northern District of the State of Illinois, Eastern Division.

IV

Plaintiffs herein further show that the said The Chicago, Rock Island and Pacific Railway Company, the Missouri-Kansas-Texas Railroad Company, the Missouri Pacific Railroad Company, and the St. Louis-San Francisco Railway Company, hereinafter called the West Side Lines, on or about February 5, 1925, filed their certain complaint with the Interstate Commerce Commission and numbered on the docket of the said Commission as No. 16697 against the plaintiffs herein and other common carriers, defendants therein, whereby and whereunder the said West Side Lines averred in substance that there are certain terminal and transfer companies engaged in carrying freight across the Mississippi River between St. Louis, Missouri, and East St. Louis, Illinois, for whose services certain charges are made by such companies; that under the practice in effect at the St. Louis-East St. Louis gateway and also at Alton, Illinois, and West Alton, Missouri, the West Side Lines are compelled to assume the burden of effecting delivery of all eastbound through traffic at points on the east side of the Mississippi River and to assume the burden of accepting and receiving all westbound through traffic at points on the east side of the Missouri River; that the West Side Lines pay and bear the charges incurred by the bridge and transfer companies for transporting the

through traffic in both directions across the Mississippi River; that the said practice is unjust, unreasonable, unduly preferential, unduly discriminatory, unduly prejudicial, unlawful and illegal within the meaning of those terms as used in the Act to Regulate Commerce as between the West Side Lines and the defendants therein, and that [fol. 5] under a proper, just, reasonable, lawful and nonprejudicial and nonpreferential practice the defendants therein should assume the burden of and effect delivery of all through westbound traffic at St. Louis and at West Alton, and should pay and ultimately bear the transfer charges thereon; that under a proper, just, reasonable, lawful, nonprejudicial and non-preferential practice the point of interchange, as to all through westbound traffic, should be on the west side of the Mississippi River.

The said complaint further averred that the defendants therein have terminals on the west bank of the Mississippi River for handling local traffic to or from St. Louis, Missouri, by virtue of the instrumentalities of the various terminal and transfer companies, but that they assume to have no such terminals on the west bank of the river for delivering to or receiving from their connections through traffic; that the defendants therein have failed and refused to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes.

The prayer of the said complaint was that an order be made commanding the defendants therein to cease and desist from the aforesaid practices and that the defendants therein be required to pay and bear the transfer charges on all westbound through traffic, to effect delivery thereof to the West Side Lines at St. Louis and West Alton, Missouri, to provide reasonable facilities for operating through routes through said St. Louis and West Alton, Missouri, to make reasonable rules and regulations therefor and to pay to the said West Side Lines damages for the alleged unlawful practices as set out in the said complaint. A copy of the said complaint attached hereto marked "Exhibit No. 3," and made a part hereof with like force and effect as if set forth in extenso herein.

V

Plaintiffs further show that the defendants in the said cause including plaintiffs herein filed answers denying generally the material allegations of the complaint and joining issue and that the said cause being at issue was set down for hearing in the City of St. Louis, Missouri, on September 21, 1925 and was heard at the said time and place before [fol. 6] William A. Disque, Attorney-Examiner of the Interstate Commerce Commission; that thereafter briefs were filed with the Interstate Commerce Commission by the parties to the said cause and the said Commission on March 10, 1926 heard oral argument at the conclusion of which the said cause stood submitted and was taken under advisement.

VI

Plaintiffs further show that on July 12, 1926 the Interstate Commerce Commission issued its report and order in said cause, a copy of which report and order as corrected by the Interstate Commerce Commission have been heretofore referred to and made a part of this Bill of Complaint as Exhibit No. 1.

VII

Plaintiffs further show that on or about August 14, 1926 they filed with the Interstate Commerce Commission a petition in their behalf for reargument and reconsideration of the said cause and for a postponement of the effective date of the order therein; that on August 20, 1926 the Interstate Commerce Commission entered an order postponing the effective date of its order of July 12, 1926 in said cause to December 11, 1926, a copy of which order of August 20, 1926 has been heretofore referred to and made a part of this Bill of Complaint as Exhibit No. 2.

VIII

Plaintiffs further show that on October 4, 1926 the Interstate Commerce Commission entered an order in said cause denying the said petition of the plaintiffs herein for reargument and reconsideration of the said cause. A copy of the said order of October 4, 1926, is attached hereto marked

"Exhibit No. 4," and made a part hereof with like force and effect as if set forth in extenso herein.

IX

Plaintiffs further show that Honorable Joseph B. Eastman, chairman of the Interstate Commerce Commission, filed a dissenting opinion to the report of the said Inter- [fol. 7] state Commerce Commission of July 12, 1926 in said cause, in which dissenting opinion Honorable Henry C. Hall and Honorable Thomas F. Woodlock, commissioners of said Commission, concurred. A copy of the dissenting opinion of the said Joseph B. Eastman is attached hereto marked "Exhibit No. 5," and made a part hereof with like force and effect as if set forth in extenso herein.

X

Plaintiffs further show that they are all common carriers by railroad subject tothe Interstate Commerce Act; that they participate in the transportation of westbound traffic which moves through East St. Louis, Illinois and St. Louis, Missouri to destinations beyond St. Louis, Missouri; that the order of the Interstate Commerce Commission entered in the the said cause applies only to westbound freight traffic moving through East St. Louis, Illinois and St. Louis, Missouri, the rates on which traffic are made on the combination basis, that is, the through rates, applicable to such traffic are made by adding or combining the rates of the plaintiffs herein and the rates of the said West Side Lines; that the rates of the plaintiffs herein lawfully applicable to such traffic apply only to East St. Louis, Illinois, that the rates of the said West Side Lines lawfully applicable to such traffic apply from East St. Louis, Illinois; that the rates of the plaintiffs herein lawfully applicable to such traffic which apply only up to East St. Louis, Illinois, do not cover and have never covered the services rendered by such transfer or terminal companies as may move such traffic from East St. Louis, Illinois to St. Louis, Missouri; that the rates of the said West Side Lines lawfully applicable to such traffic cover and have since 1877 covered the services rendered by such transfer or terminal companies as may move the traffic from East St. Louis, Illinois to St. Louis, Missouri.

XI

Plaintiffs further show that prior to 1877 the through rates on such westbound traffic were made up of the charges of the plaintiffs herein or their predecessors up to East St. Louis, Illinois, plus the charges of the terminal or trans-
[fol. 8] fer companies for the services they rendered in transportating such traffic from East St. Louis, Illinois to St. Louis, Missouri, plus the charges of the west Side Lines or their predecessors beyond; that in 1877 the Chicago and Alton Railroad Company completed its line of railroad from Kansas City, Missouri to East St. Louis, Illinois, by way of Louisiana, Missouri, and thence down the east bank of the Mississippi River; that the Chicago and Alton Railroad Company having its own line into East St. Louis, Illinois, interchanged at East St. Louis, Illinois, at that time and has interchanged ever since, traffic with the plaintiffs herein; that through westbound traffic received at East St. Louis, Illinois, by the Chicago and Alton Railroad Company from the plaintiffs herein, moving over the line of the said Chicago and Alton Railroad Company from East St. Louis, Illinois, was not transported by such terminal or transfer companies from East St. Louis, Illinois to St. Louis, Missouri, the effect of which was to make the through rates aplicable to such through westbound traffic the rates of the plaintiffs herein or their predecessors up to East St. Louis, Illinois, plus the rates of the Chicago and Alton Railroad Company from East St. Louis, Illinois; that is to say, the through rates applicable to such through westbound traffic when moving from East St. Louis, Illinois, over the rails of the Chicago and Alton Railroad Company, were less than the through rates that would have been applicable to such traffic had it been transported from East St. Louis, Illinois to St. Louis, Missouri, by a terminal or transfer company and at St. Louis, Missouri delivered to a west side line for transportation beyond, by the amount of the charges of such terminal or transfer company.

Plaintiffs futher show that the said West Side Lines, to meet this competitive situation resulting from the entrance of the Chicago and Alton Railroad Company into East St. Louis, Illinois, published and applied in 1877 and have ever since published and applied both to and from East

St. Louis, Illinois, the rates that they published and applied to and from St. Louis, Missouri, and have ever since 1877 paid out of the rates which they thus voluntarily published and applied to and from East St. Louis, Illinois, the charges [fol. 9] of the transfer or terminal companies for the services such companies rendered in transporting the freight between East St. Louis, Illinois and St. Louis, Missouri. The rates of the said West Side Lines applying on such through westbound traffic now cover and ever since 1877 have covered the transportation of such westbound traffic from East St. Louis, Illinois, including such transportation services as may be necessary to transport such traffic from East St. Louis, Illinois to St. Louis, Missouri, and were made and established upon the theory and understanding that this transfer charge should be so borne by the said West Side Lines.

Plaintiffs further show that the fact that the said West Side Lines have since 1877 voluntarily published and applied from and to East St. Louis, Illinois, the rates that they have published and applied from and to St. Louis, Missouri, and have undertaken since 1877 to provide and pay for such transportation services as might be required under the rates which they have voluntarily published and applied from East St. Louis, Illinois, on through westbound traffic, is not a "practice" within the meaning of that word as used in the Interstate Commerce Act, but if it were any "practice" at all it would be a "practice" not of the plaintiffs herein but of the said West Side Lines and a "practice" voluntarily established and voluntarily maintained by said West Side Lines since 1877.

XII

Plaintiffs further show that the Interstate Commerce Commission in entering the order it did in said cause acted on the assumption that the facts surrounding the payment by the West Side lines out of the rates which they have voluntarily published and applied on west bound traffic from East St. Louis, Illinois since 1877 of the charges of the terminal or transfer companies for the services rendered in transporting such traffic from East St. Louis,

Illinois to St. Louis, Missouri, constitute a "practice" within the meaning of that word as it appears in the Interstate Commerce Act and a "practice" of the plaintiffs herein. If it be not a "practice" within the meaning of that word as used in the Interstate Commerce Act, then the [fol. 10] order of the Interstate Commerce Commission in said cause is null and void for the Interstate Commerce Commission in its report assumed to act only by virtue of those provisions of the Interstate Commerce Act which give it certain jurisdiction with respect to "practices" within the meaning of that word as used in Paragraphs (6) and (11) of Section 1 and Paragraph (1) of Section 15 of the Interstate Commerce Act. The order purports to change a "practice" only and was made in a proceeding in which the plaintiff herein invoked only such jurisdiction as the Interstate Commerce Commission may have over "practices" within the meaning of that word as it appears in the Interstate Commerce Act.

Plaintiffs further show that the Interstate Commerce Commission in holding that the facts hereinbefore referred to constitute a "practice" within the meaning of that word as used in the Interstate Commerce Act, has entirely misconceived, misconstrued and misinterpreted the meaning of the word "practice" as used in the Interstate Commerce Act and that the order of the Interstate Commerce Commission in the said cause, predicated as it is upon such a construction by the Interstate Commerce Commission of the word "practice", is based upon a mistake of law, is null and void and beyond the power conferred upon the Interstate Commerce Commission by the Interstate Commerce Act.

XIII

Plaintiffs further show that the order of the Interstate Commerce Commission in said cause does not require any change in the manner in which the said through westbound traffic is now handled and transported through and from East St. Louis, Illinois, to St. Louis, Missouri; that it affects not in the slightest degree the method in which the actual physical exchange of traffic is now made between the plaintiffs herein and the said West Side Lines; that if the said order is permitted to take effect on December 11, 1926 the said through westbound traffic will be handled and

transported through and from East St. Louis, Illinois to St. Louis, Missouri in exactly the same manner as it is now handled and transported; that the said order goes solely to the apportionment as between the plaintiffs herein and [fol. 11] the said West Side Lines of the revenue on the said through west bound traffic; that the Interstate Commerce Commission itself said in its report in said cause that:

"In deciding what would be a reasonable practice, primary consideration should be given to what is a fair method of apportioning the revenue regardless of the competition of the Alton";

that the sole and only effect of the said order is to reduce the plaintiffs' shares or divisions of the through combination rates which are not joint rates lawfully applicable to such traffic by the amount of the charges of the terminal or transfer companies for services they render in transporting such through westbound traffic from East St. Louis, Illinois, to St. Louis, Missouri, and to increase the shares or divisions of the West Side Lines by the amount of such charges.

Plaintiffs further show that the order of the Interstate Commerce Commission in said cause purports to require a change in the "practice" within the meaning of that word as used in the Interstate Commerce Act but that the order really deals solely with the shares or the divisions of rates and that the sole and only effect of the order is to reduce the shares or divisions of the rates of the plaintiffs herein lawfully applicable to through westbound traffic and to increase the shares or the divisions of the rates of the West Side Lines lawfully applicable to such traffic.

Plaintiffs further show that the complaint in said proceeding did not attack or deal with the reasonableness of such shares or divisions; that there has been no hearing with respect to the reasonableness thereof and that no evidence was introduced tending to show that they were unreasonable; that there has been no finding by the Interstate Commerce Commission in that respect and that therefore the order of the Interstate Commerce Commission is beyond the jurisdiction conferred upon said Commission by the Interstate Commerce Act and null and void.

XIV

Plaintiffs further show that in those cases where there are joint through rates in effect applying on through westbound traffic moving through East St. Louis-St. Louis, di- [fol. 12] visions have been agreed upon between the plaintiffs herein and the said West Side Lines and that in each and every case the divisions make and break on East St. Louis, Illinois; that is to say, that the divisions of the plaintiffs herein out of the joint through rates applying on such traffic extend to East St. Louis, Illinois, and that the divisions of the said West Side Lines applying on such traffic extend from East St. Louis, Illinois; that East St. Louis, Illinois, has been the rate-making, the rate dividing and the rate-breaking point with respect to the establishment of rates on both eastbound and westbound traffic since 1877; that the Interstate Commerce Commission in its report in the said cause found that it was not convinced that the reception for a number of years by the said West Side Lines of the divisions of such joint through rates in which the transfer charge was included, did not constitute an acquiescence by the said West Side Lines in such divisions which was tantamount to an agreement on their part to pay the transfer charge on such traffic and that as to traffic moving under joint through rates the said Interstate Commerce Commission was not prepared at this time to make a definite finding upon the issues and the record before it.

XV

Plaintiffs further show that even if it be conceded that the payment by the West Side Lines of the charges which the terminal or transfer companies make for the services they render in transporting through westbound freight from East St. Louis, Illinois, to St. Louis, Missouri, out of the rates of the said West Side Lines which those lines voluntarily established and applied from East St. Louis, Illinois, is a "practice" within the meaning of that word as used in the Interstate Commerce Act, there was no evidence whatever in said cause before the Interstate Commerce Commission which would enable that Commission to determine whether the rates or the divisions of the plaintiffs herein applying up to East St. Louis, Illinois, on through

westbound traffic should be reduced by the amount of the charges of the terminal or transfer companies for the services they render in transporting freight from East St. Louis, Illinois, to St. Louis, Missouri, and the rates or divisions of the said West Side Lines increased by such {fol. 13} amounts or would support or tend to support the finding of the Commission that such alleged "practice" was in any respect unjust and unreasonable.

XVI

Plaintiffs aver that the said order of the Interstate Commerce Commission is unlawful and void upon the following grounds:

(1) That which is declared by the Interstate Commerce Commission in its report and order to constitute a "practice" is not a "practice" within the meaning of that word as used in the Interstate Commerce Act.

(2) The Interstate Commerce Commission has no power under the sections of the Interstate Commerce Act referred to in its report or any other sections of said Act, to make the said order. The order of the Interstate Commerce Commission exceeds the statutory power conferred upon the Interstate Commerce Commission by the Interstate Commerce Act.

(3) If the facts set out in the report of the Interstate Commerce Commission constitute a "practice" within the meaning of that word as used in the Interstate Commerce Act there was no evidence before the Interstate Commerce Commission in said cause which would enable the Commission to determine whether such "practice" was in any respect unreasonable or unjust, or would support or tend to support the finding of the Interstate Commerce Commission that such "practice" was unjust and unreasonable.

(4) The order of the Interstate Commerce Commission is without any evidence to support it.

(5) The order of the Interstate Commerce Commission is arbitrary.

(6) The order of the Interstate Commerce Commission, based as — is upon a misconception of the Interstate Com-

merce Act and an erroneous construction of that Act deprives the plaintiffs herein of their property without due process of law and is in contravention of the constitution of the United States and particularly the Fifth Amendment thereto.

[fol. 14] XVII

The officers of the defendant, unless restrained by this Honorable Court, will institute innumerable suits and prosecutions against the plaintiffs, their agents and servants for failure to comply with said opinion and order, and for alleged violations thereof, and will subject the plaintiffs to innumerable actions to recover fines and penalties, and their employees to innumerable arrests, suits, fines and imprisonments, and plaintiffs will be wrongfully deprived of large sums of moneys and revenues which will be irretrievably lost to plaintiffs to the great and irreparable damage and injury to them and each of them.

Wherefore plaintiffs and each of them pray:

(1) That this Court adjudge, order and decree that the corrected report and order of the Interstate Commerce Commission of July 12, 1926, in said cause are beyond the authority of the Commission and are without warrant in law and null and void and that said corrected report and order be set aside and annulled.

(2) That this Court grant unto the plaintiffs herein a writ of subpœna directed to defendant The United States of America commanding it on a certain day therein to be specified to be and appear before this Court and then and there full, true and complete answer make to all and singular the premises and to perform and abide by such order and decree herein as this Court shall deem meet and agreeable to equity and good conscience.

(3) That this Court direct that due and proper notice of this Bill be served forthwith on the defendant herein as provided in the said Act of October 22, 1913.

(4) That upon the filing of this Bill the Judge of this Court call to his assistance two other judges, one of whom shall be a circuit judge, and that upon five (5) days' notice of the time and place of hearing having been given to the Attorney-General of the United States and to the Interstate

Commerce Commission, plaintiffs herein be granted a temporary injunction restraining the Interstate Commerce Commission from enforcing the said order.

(5) That this court upon final hearing of this suit enter a decree herein enjoining, setting aside, annulling and sus-
[fol. 15] pending the said order of the Interstate Commerce Commission and permanently enjoining the enforcement of the said order.

(6) That the plaintiffs herein and each of them may have such other and further relief in the premises as to equity may appertain and as may be deemed by this court fit and proper.

D. P. Connell, Homer T. Dick, W. A. Northcutt, Guernsey Orcutt, Charles J. Rixey, Louis H. Strasser, W. J. Stevenson, Elmer A. Smith, Frank H. Towner, Morrison R. Waite, Solicitors for Plaintiffs.

Duly sworn to by T. C. Powell. Jurat omitted in printing.

EXHIBIT No. 1 TO BILL OF COMPLAINT

Corrected Report

Interstate Commerce Commission

No. 16697

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al.

v.

BALTIMORE & OHIO RAILROAD COMPANY et al.

Submitted March 10, 1926. Decided July 12, 1926

1. Practice which requires the west-side lines to bear the expense of transferring across the river from East St. Louis, Ill., to St. Louis, Mo., westbound freight moving under combination rates the same on East St. Louis as on St. Louis found to be unreasonable. Reasonable practice prescribed. Reparation denied.

2. Careful study of divisions of joint rates on westbound traffic through East St. Louis and St. Louis commended to interested carriers with view to readjustment thereof in conformity with just and reasonable practice in respect of interchange switching herein approved for general application.

[fol. 16] Joseph M. Bryson, W. F. Dickinson, Edward J. White, E. T. Miller, C. S. Burg, Wallace T. Hughes, H. H. Larimore, and M. G. Roberts for complainants.

D. P. Connell, Homer T. Dick, Herbert S. Harr, James A. Knowlton, William A. Northcutt, Guernsey Orcutt, Louis H. Strasser, Elmer A. Smith, William J. Stevenson, Frank H. Towner, and H. L. Walker for defendants.

Kenneth F. Burgess and Walter McFarland for Chicago, Burlington & Quincy Railroad Company, defendant and cross-complainant.

Report of the Commission

CAMPBELL, Commissioner:

Exceptions to the proposed report of the examiner were filed by complainants and defendants, and the case was orally argued. Our conclusions differ from those of the examiner.

The ultimate question here is whether the east-side lines or the west-side lines should bear the expense incident to the transfer across the Mississippi River from East St. Louis, Ill., to St. Louis, Mo., of practically all carload and less-than-carload through freight originating east of the St. Louis-East St. Louis district and destined west thereof.

The complainants are four of the important west-side carriers serving St. Louis, the St. Louis-San Francisco, Missouri Pacific, Missouri-Kansas-Texas, and Chicago, Rock Island & Pacific.

The principal defendants are the east-side carriers serving East St. Louis, 13 in number, although most of the carriers in the eastern and southern groups are also named as defendants. Defendants Chicago, Burlington & Quincy and Wabash, with lines on both sides of the river, have made themselves cross-complainants with respect to trans-Mississippi River traffic moving over their lines west of the

river and interchanged with each other or with other defendants through the St. Louis-East St. Louis gateway. To the extent that they are cross-complainants they seek whatever relief is accorded complainats.

None of the east-side lines serving East St. Louis has its own rails across the river to St. Louis and none of the west-side lines serving St. Louis has its own rails directly across the river to East St. Louis. The traffic is transferred from [fol. 17] one side of the river to the other by the Terminal Railroad Association of St. Louis and its subsidiaries, all of which will be hereinafter referred to collectively as the Association.

For years past the west-side lines have borne the Association's transfer charges on practically all east-bound and westbound through traffic. They are willing to continue the present practice with respect to all east bound traffic, but contend that the east-side lines should bear the charges on all the westbound traffic under consideration. Based on a test period of 28 months from February 5, 1923, to May 31, 1925, on westbound traffic and of 17 months from January 1, 1924 to May 31, 1925, on eastbound traffic, the carload movement between the four complainants and the east-side lines at St. Louis and East St. Louis was divided, on the average per month, 29 per cent westbound and 71 per cent eastbound. On that basis the transfer charges of the Association on this traffic during twelve months embraced within both of those periods would have divided $1,746,016.55 on eastbound traffic and $713,161.69 on westbound traffic.

In substance, the allegations of the complaint are that the east-side lines' practice of requiring the west-side lines to assume the burden and expense of delivering through westbound traffic to them at St. Louis, while at the same time being relieved by the west-side lines of the similar burden and expense on eastbound traffic, is unjust, unreasonable, unjustly discriminatory, unduly preferential and prejudicial, unlawful, and illegal. There is a further allegation that the eastside line refuse to provide reasonable facilities for the operation of through routes and to make reasonable rules and regulations with respect to the operation of such routes, but no change in the present method of handling

the traffic is sought. This allegation is included only to provide a basis for a certain contention, hereinafter dealt with, which bears upon the propriety of the practice mentioned. All that the west-side lines seek in this case is to be relieved of paying the transfer expense on westbound traffic. In the final analysis their prayer is that we condemn the present practice, require the observance of a proper practice, and award reparation for the two-year period prior to February 5, 1925, the date on which the complaint was filed.

[fol. 18] Defendants take the position that the word "practice" as used in the act relates only to matters between shippers and carriers and not to questions affecting the handling of traffic between carriers. We do not agree with this contention. The word "practice" as used in paragraphs (6) and (11) of section 1 and paragraph (1) of section 15 of the act seems to us clearly to comprehend within its meaning the subject matter here presented. Paragraph (6) of section 1 makes it the duty of all common carriers subject to our jurisdiction to establish, observe, and enforce just and reasonable practices affecting all matters relating to or connected with the receiving, handling, transporting, and delivery of property subject to the provisions of the act, and every unjust and unreasonable practice is prohibited and declared to be unlawful. Paragraph (11) of section 1 makes it the duty of every carrier by railroad subject to the act to establish, observe, and enforce just and reasonable practices with respect to car service, and every unjust and unreasonable practice with respect to car service is prohibited and declared to be unlawful. The term "car service" is defined in paragraph (10) of the same section as including the "use, control, supply, movement, distribution, exchange, interchange, and return of * * * cars * * * used in the transportation of property" Paragraph (1) of section 15 confers upon us the power to determine whether the foregoing provisions of the law have been or are being violated, and to prescribe what practice is or will be just, fair, and reasonable.

Much of the traffic through the St. Louis-East St. Louis gateway moves on joint rates. As to this traffic the carriers divisional arrangements provide that the joint rates, eastbound and westbound, shall break on East St. Louis;

that its, that certain proportions shall accrue up to that point and certain proportions beyond. Generally, the divisional arangements make no specific provision regarding the payment or disposition of the transfer expense. However, as the joint rates break on East St. Louis, and as the transfer takes place west of that point the east-side lines have always left the transfer expense in connection with both eastbound and westbound through traffic moving on joint rates to be borne by the west-side lines. Apparently, in only one instance, affecting a relatively small volume of traffic, do the divisional arangements make any specific [fol. 19] provision respecting the transfer. In this instance provision is made for deducting before pro-rating, an amount in excess of the transfer expense and adding it to the proportion accruing to the west-side lines. The deduction, of course, has the effect of apportioning the expense between the east-side and the west-side lines. The practice of breaking the joint rates on East St. Louis rather than on St. Louis is apparently due largely to the fact that in 1877 the Chicago & Alton, hereinafter called the Alton, extended a line from the west across the Mississippi River at Louisiana, Mo., and thence south through Alton, Ill., to East St. Louis. Having its own line into East St. Louis, it there interchanges its traffic with the east-side lines. To meet this situation the west-side lines, other than the Alton, absorb the transfer charge between St. Louis and East St. Louis.

The balance of the traffic under consideration moves on combinations of locals or locals and proportionals to and from East St. Louis. Generally, the local rates of both sets of carrier to and from East St. Louis are the same as those to and from St. Louis. This makes the combination rates based on St. Louis the same as those based on East St. Louis. On traffic in both directions, where the combination is the same on St. Louis as on East St. Louis, the east-sides lines apply their St. Louis-East St. Louis rates only to or from East St. Louis, leaving it to the west-side lines to protect the combination rates by applying the St. Louis-East St. Louis rates to or from East St. Louis. This, of course, compels the westside lines to pay the cost of the transfer, and leaves the full St. Louis-East St. Louis rates for the east-side lines. The entire practice above

outline is in accordance with the tariffs of the east-side lines, which contain a provision to the effect that where no joint rates are provided and the combinations are the same on St. Louis as on East St. Louis, through rates will be made on the East St. Louis combinations. This provision is intended to mean that the east-side lines' local rates to and from St. Louis may not legally be used as proportional or basing rates on traffic coming from or destined to points beyond. It has no effect on the amount of the through rates, nor does it create joint rates, but it is a direction to agents and accounting forces to use the east-side lines' factors in the combination rates only to or from [fol. 20] East St. Louis. The practice referred to had its origin in the building of the Alton into East St. Louis. Traffic over that line between St. Louis and points west moved through East St. Louis and accordingly it became necessary, as a practical matter, for the Alton to apply the same rates between East St. Louis and the west as applied between St. Louis and the west. The other west-side lines adopted the Alton's rates, and in competition with that road, which, as previously stated interchanges its traffic with the east-side lines at East St. Louis, they allowed the east-side lines their full locals to or from East St. Louis by absorbing the transfer charge.

Traffic from and to points within about 100 miles of the St. Louis-East St. Louis district, moving at rates which are not the same based on East St. Louis as on St. Louis, is the only westbound traffic not embraced in the case. With respect to this traffic there is no question as to who must bear the transfer expense, as it is included in only one of the rate factors.

In general support of their complaint the west-side lines rely largely on the fact that it is the common practice of carriers to reciprocally bear the burden or expense of transferring through traffic from one line to another. As a rule, the carrier which performs the inbound haul, the delivering carriers, switches or trucks the freight to its connection, or pays the expense of that service if performed by a third party. One of the few exceptions to this rule is found in other than trans-river traffic interchanged in the St. Louis-East St. Louis district, where the receiving line bears the charge of any intermediate switching

carrier. Among the few instances throughout the country in which reciprocity does not prevail is the situation here presented.

Before proceeding further it is desirable to state briefly the nature, status and function of the Association. It is a corporation, the stock of which is owned in equal proportions by 15 of the principal east-side and west-side lines serving the St. Louis-East St. Louis district. The east-side lines hold a majority of the shares. The Association's rails cross the river and it has terminal facilities, including depots and team tracks, in both St. Louis and East St. Louis, where it receives and delivers freight. It holds itself out to perform service for all carriers. Though it is a common carrier, it may not legally operate in all re- [fol. 21] spects as a railroad transportation company, having been perpetually enjoined several years ago from operating otherwise than as a terminal and interchange facility for railroads. See United States v. St. Louis Terminal, 224 U. S. 383, and 236 U. S. 194. The contract between the carriers, by which they may, under the Court's decree, continue the Association and the operation of its facilities, contemplates that all carriers shall have equitable treatment in the matter of service, rights, accommodations, benefits, burdens, expenses, charges, etc. Though they do not ordinarily exercise them, the proprietary companies have trackage rights over the Association's line between St. Louis and East St. Louis. Under this contract the properties of the Association represent, in legal and practical effect, the extension of the east-side lines into St. Louis and of the west-side lines into East St. Louis.

In addition to the facilities that the Association affords them, several of the east-side lines own or lease other facilities in St. Louis, such as depots and team tracks, where they receive and deliver in their own names traffic moving between St. Louis and points on their lines. The east-side lines advertise through service to and from St. Louis and in their tariffs show St. Louis as a point on their lines. In apparently all respects as to both freight and passenger traffic the east-side lines individually recognize St. Louis as a station on their lines.

The west-side lines contend that by bearing the transfer expense to East St. Louis on nearly all eastbound through

traffic they are, through the Association, carrying the traffic to the ends of their lines and delivering it to the east-side lines at East St. Louis, and that the east-side lines by refusing reciprocally to bear the transfer expense to St. Louis on all westbound through traffic are refusing to carry the traffic to the ends of their lines for delivery to the west-side lines, and are thus refusing to provide properly for the operation and maintenance of through routes and joint rates.

The west-side lines also contend that in view of the foregoing facts St. Louis is the lawful point of delivery to their lines for through traffic, and that the payment of the transfer charges of the Association is just as much a part of that delivery as would be the expense of that delivery if the [fol. 22] east-side lines had their own rails to St. Louis. They regard the Association as the agent of the east-side lines and say that the agent should receive its compensation from its principals. They contend that the existence of the agency relation is evidenced by the fact that the east-side lines relieve the Association of rental charges on equipment by allowing the Association's switching reclaims, this being done under the generally recognized per-diem rules of the American Railway Association, which provides that the carrier performing the inbound haul shall pay the car rental charges. As further indicating that the Association is the agent of the east-side lines, the west-side lines point out that it is the general custom, as before stated, for the line performing the inbound haul to make delivery to its connection and to do so without making a charge therefore against the receiving line. The east-side lines state that the west-side lines hold themselves out to accept the traffic at East St. Louis, that for years it has been delivered to them at that point, and that the Association is clearly the agent of the west-side lines. They point out that at Ohio River crossings on traffic moving between points north and points south of the Ohio River the combination rates are the same based on the north bank points as on the south bank points, and the southern lines receive and deliver the traffic on the north bank, thus relieving the central territory lines of all expense connected with the transfer of the traffic across the river. Nevertheless, the fact remains that the general custom among rail carrier throughout the country is as stated by complainants.

The east side lines, in interchanging traffic between themselves in East St. Louis, do so on a reciprocal basis, the receiving line paying the transfer charge of any intermediate line. The west side lines contend that so long as the trans-river traffic is not interchanged on a reciprocal basis this results in unjust discrimination against and in undue prejudice to them. We see here merely a difference in practice in which the west side lines have no real interest.

The west side lines say that through their payment of the transfer charges on nearly all traffic in both directions they are contributing in major part to the Association's expenses and that, therefore, its expenses are not equitably apportioned, although the contract covering the operation [fol. 23] and maintenance of the Association contemplates that they should be. We are not asked, of course, to specifically enforce the terms of the contract, but the matter has some bearing upon the question of the reasonableness of the practice complained of.

The west side lines say that when the divisions of joint rates were fixed nothing to compensate them for the payment of the transfer charge was added to their proportions. It has been customary to divide the joint rates by allowing certain fixed proportions east and west of East St. Louis, and as the transfer service takes place west of East St. Louis it has always been understood that the west side lines would bear it. The west side lines are apparently of the view that if it had not been for the competition of the Alton their joint rates would break on St. Louis and that they would receive the same proportions as they now receive west of East St. Louis out of which the transfer charge has to be paid; in other words, that although the existing proportions may have been agreed to by complainants they were agreed to as a matter of necessity. They are, however, the same as those accepted by, and apparently agreeable to, the Alton, which unquestionably cover all service west of East St. Louis. Five of the eight west side lines which serve St. Louis also serve East St. Louis and three of them, when they receive traffic at East St. Louis, may, as to many destinations, entirely avoid handling it through St. Louis.

In presenting data to us in previous cases relating to the adequacy of their revenues, the west side lines treated the

amounts paid by them to the Association as operating expenses. The east side lines urge, therefore, that the general increases granted the west side lines in the past must be presumed to have fully compensated them for the transfer expenses. With this contention we cannot agree.

The east side lines regard this case solely as one relating to the division of joint rates and contend that the relief sought in the form of a change in practice is not the proper remedy for the complainants' alleged grievance. The principal east side lines make this point in their answers to the complaint. The west side lines contend that the east side lines by this averment have joined issue on the propriety of the existing divisions and are estopped from saying that [fol. 24] divisions are not in issue. It is sufficient to say that the west side lines stated early in the hearing that they desired to submit the case on the issues presented by them, and the propriety of the divisions was not made the subject of inquiry and investigation.

The question presented is whether is it a reasonable practice for the east side lines to deliver the traffic to the west side lines in such a way as to compel the westside lines to pay the transfer charge from East St. Louis to St. Louis. As explained, the combination rates to and from St. Louis and East St. Louis overlap. The placing of those two points in one group with respect to rates to and from points east was the result of pressure from St. Louis interests. In establishing this parity, in 1908, the east side lines reduced the rates to and from St. Louis and increased those to and from East St. Louis, but the increases were far from sufficient to compensate for the reductions. Later, however, in establishing the rates authorized in C. F. A. Class Scale Case, 45 I. C. C. 254, the distances between central territory points and St. Louis were used to determine the rates to East St. Louis. As previously explained, the grouping of these two points with respect to traffic to and from points west and the west side lines' practice of bearing the transfer expense was brought about in 1877 by the construction of the Alton into East St. Louis.

The west side lines emphasize the fact that when the rates of the east side lines to St. Louis and East St. Louis were put on a common basis the rates formerly existing to East

St. Louis were not extended to St. Louis, but were increased to compensate in part for the reduction to St. Louis and reflect in some measure the transfer expense. The east side lines' reply that their own readjustment represented a concession to the public, made under the stress of commercial pressure. They say that when the complainant west side lines established their St. Louis-East St. Louis rate parity they did so in pursuance of a self-serving policy, to draw traffic away from the Alton, and are here seeking to have the east side lines saddled with the cost.

The west side lines admit that they are still compelled by the competition of the Alton to maintain the rate parity, but we have no assurance that throughout all the years since 1877 no other circumstance, except perhaps one like that [fol. 25] which caused the east side lines to establish a rate parity, would have brought about an adjustment resulting in the same overlap as now exists. Regardless of the original cause, the fact is that St. Louis and East St. Louis, as to traffic moving to and from these points, are now in one rate group. In deciding upon what would be a reasonable practice, primary consideration should be given to what is a fair method of apportioning the revenue regardless of the competition of the Alton. If that competition is forceful now, it will continue so, regardless of whether or not the relief sought is granted. The east side lines are entitled to such advantageous effects as it may hereafter produce, but its history does not control in determining a reasonable practice.

The history of both the combination rates and the divisions of the joint rates applicable to this traffic indicates that the transfer charge of the Association was given little or no consideration in the establishment of any of these rates or divisions. The fact is that, finding the opportunity there, defendants took advantage of it to require complainants to continue to pay the transfer charge, not only on eastbound traffic, but also on westbound traffic. As pointed out, St. Louis is shown as a point on defendant east side lines. All of the traffic with which this complaint is immediately concerned moves through St. Louis. No carrier participating in a through route, except by special agreement with its connection or connections, can be charged

with responsibility for transporting any shipment over such through route until that shipment has been offered to it at a recognized interchange point on its lines. Until it has been so offered the responsibility rests with the connecting line. In this instance the connecting lines are the east side carriers whose lines, by virtue of the fact that St. Louis is shown as a point on their lines, extend to the respective points of interchange with complainant west side lines in St. Louis, and the responsibility for transporting this traffic rests with the east side lines until its delivery to complainants in St. Louis. This might be different if by agreement between the east side and west side lines the delivery was to be made at some other point than at St. Louis, but the west side lines have concurred in no such agreement, and no arbitrary publication of tariffs or [fol. 26] division sheets can take the place of such voluntary agreement.

Defendants' practice is contrary to the generally accepted practice throughout the country. The usual practice among rail carriers is to divide the switching expenses when the services of an intermediate carrier are utilized in effecting interchange, the switching charge being absorbed by the carrier that delivers the traffic to its connection. There is a generally recognized obligation on part of all carriers on through traffic to make delivery on the rails of their connections, either direct or by bearing the charges of the intermediate switching line, and this is the general practice of railroads throughout the country. We believe this to be a just, fair, and reasonable practice for general application, and one which should be followed by the carriers serving the St. Louis-East St. Louis district. We are not unmindful of the fact that such a practice, if applied at St. Louis and East St. Louis, cannot bring about exact reciprocity because the volume of the through traffic is considerably greater eastbound than westbound, but complainants are not asking for exact reciprocity; moreover, we believe that adoption of this practice at interchange points generally would distribute the costs of interchange switching among the respective carriers as a whole in a fair and equitable manner.

We find that for the future the practice of the east side lines in requiring the west side lines to bear the transfer

charges on westbound freight traffic moving through St. Louis and East St. Louis on combination rates which are the same on St. Louis as on East St. Louis will be unjust and unreasonable, and that the just and reasonable practice with respect to such traffic will be for the east side lines to bear or absorb all such transfer charges.

With respect to westbound traffic moving on joint rates, we are not convinced that the reception for a number of years by the west side lines of divisions of such joint rates in which the transfer charge was included does not constitute an acquiescence by the west side lines in such divisions which is tantamount to an agreement on their part to pay the transfer charge on such traffic. As to traffic moving under joint rates, therefore, we are not prepared at this time to make a definite finding upon the issues and [fol. 27] record before us. We commend to the interested carriers, however, a careful study of the divisions of joint rates on westbound traffic, with a view to readjustment thereof if and where necessary to conform to the just and reasonable practice in respect of interchange switching hereinabove approved for general application. If this is not done within a reasonable time complainants are at liberty to again bring this matter to our attention.

We cannot upon this record determine the extent of the damage which complainants may have suffered under the practice herein found unlawful. It is apparent that had the practice herein prescribed been in effect some of the traffic delivered to complainants would have been delivered to the Alton and other carriers serving western territory having their own rails into East St. Louis. The record is far from definite enough to permit a determination of the amount of the damage which any of complainants may have suffered. Accordingly, there is no need for a finding as to the past, and reparation is denied.

Our conclusions herein will be understood not to prejudice in any way the findings which may be reached in No. 14534, Rates, Regulations, and Practices of Peoria & Pekin Union Railway Company at Peoria, Ill., and Nearby Points, and consolidated cases, now pending.

An appropriate order for the future will be entered.

Corrected Order

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 12th Day of July, A. D. 1926

No. 16697

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Baltimore and Ohio Southwestern Railroad Company, The Chicago and Alton Railroad Company, William W. Wheelock and William G. Bierd, Receivers; Chicago, Burlington & [fol. 28] Quincy Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, St. Louis Southwestern Railway Company; Wabash Railway Company; Terminal Railroad Association of St. Louis, St. Louis Merchants Bridge Terminal Railway Company, The Wiggins Ferry Company, East St. Louis Connecting Railway Company, St. Louis Transfer Railway Company, Missouri and Illinois Bridge and Belt Railroad Company, East St. Louis and Carondelet Railway Company, Granite City and Madison Belt Line Railroad Company, Illinois Traction, Inc., St. Louis Electric Terminal Railway Company, Illinois Terminal Company, Alton and Southern Railroad, Chicago, Peoria and St. Louis Railroad Company, Wm. Cotter, Receiver; Litchfield and Madison Railway Company, Mobile and Ohio Railroad Company, Chicago and Eastern Illinois Railway Company, East St. Louis Junction Railroad, Southern Traction Company of Illinois, Toledo, St. Louis and Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, The Southern Railway Company, St. Louis & Belleville Electric Railway Company, St. Louis and Ohio River Railroad, The

St. Louis and O'Fallon Railway Company, The St. Louis, Troy and Eastern Railroad Company, East St. Louis, Columbia & Waterloo Railway, East St. Louis & Suburban Railway Company, and Louisville, Henderson & St. Louis Railway Company.

This case being at issue, upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed report containing its finding of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 12, 1926, and thereafter to abstain from the [fol. 29] practice of requiring the above-named complainants, together with the Chicago, Burlington & Quincy Railroad Company and the Wabash Railway Company, to bear the charges for transfer services from East St. Louis, Ill., to St. Louis, Mo., on westbound freight traffic passing through both points on combination rates which are the same on St. Louis as on East St. Louis.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 12, 1926, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of westbound freight traffic passing through both East St. Louis, Ill., and St. Louis, Mo., on combination rates which are the same on St. Louis as on East St. Louis, and delivered to complainants, or the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company, the practice of bearing or absorbing on such traffic the charges for transfer services from defendants' lines in East St. Louis, Ill., to the lines of complainants, or of the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company in St. Louis, Mo.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 30] Exhibit No. 2 to Bill of Complaint

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 20th Day of August, A. D. 1926

No. 16697

Chicago, Rock Island & Pacific Railway Company et al.

v.

Baltimore & Ohio Railroad Company et al.

Upon petition of defendants, and for good cause shown:

It is ordered, That the effective date of the order, as corrected, of July 12, 1926 entered herein be, and it is hereby postponed to Decembr 11, 1926.

By the Commission:

George B. McGinty, Secretary. (Seal.)

Exhibit No. 3 to Bill of Complaint

Filed Feb. 5, 1925

Interstate Commerce Commission

Docket No. 16697

The Chicago, Rock Island and Pacific Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, Complainants,

vs.

The Baltimore and Ohio Railroad Company et al., Defendants

Complaint

W. T. Hughes, C. S. Burg, H. H. Larimore, M. G. Roberts, Attorneys for Complainants.

St. Louis, Mo., February 3, 1925.

[fol. 31] Before the Interstate Commerce Commission

The Chicago, Rock Island and Pacific Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, Complainants,

vs.

The Baltimore and Ohio Railroad Company, Baltimore and Ohio Southwestern Railroad Company, William W. Wheelock and William G. Bierd, Receivers of The Chicago and Alton Railroad Company, Chicago, Burlington and Quincy Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, St. Louis Southwestern Railway Company, Wabash Railway Company, Terminal Railroad Association of St. Louis, St. Louis Merchants Bridge Terminal Railway Company, The Wiggins Ferry Company, East St. Louis Connecting Railway Company, The St. Louis Transfer Railway Company, Missouri and Illinois Bridge and Belt Railroad Company, East St. Louis and Carondolet Railway Company, Granite City and Madison Belt Line Railroad Company, Illinois Traction, Inc., St. Louis Electric Terminal Railway Company, Illinois Terminal Railroad Company, Alton and Southern Railroad Company, Chicago, Peoria and St. Louis Railroad Company, Litchfield and Madison Railway Company, Mobile and Ohio Railroad Company, Chicago and Eastern Illinois Railway Company, East St. Louis Junction Railroad Company, Southern Traction Company of Illinois, Toledo, St. Louis and Western Railroad Company, New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, The Southern Railway Company (St. Louis-Louisville Division), Southern Railway Company, St. Louis and Belleville Electric Railway Company, St. Louis and Ohio River Railroad Company, St. Louis and O'Fallon Railway Company, St. Louis, Troy and Eastern Railroad Company, The, and other common carriers by railroad shown in the appendix hereto attached, Defendants.

Complaint

[fol. 32] The complainants in the above entitled complaint respectfully show:

I

That The Chicago, Rock Island and Pacific Railway Company is a railroad corporation organized under the laws of the States of Iowa and Illinois and has its principal office at Chicago, Illinois; that the Missouri-Kansas-Texas Railroad Company is a railroad corporation organized under the laws of the State of Missouri and has its principal office at St. Louis, Missouri; that the Missouri Pacific Railroad Company is a corporation organized under the laws of the State of Missouri and has its principal office at St. Louis, Missouri; that the St. Louis-San Francisco Railway Company is a railroad corporation organized under the laws of the State of Missouri and has its principal office at St. Louis, Missouri; that the complainants and defendants herein are common carriers engaged in the transportation of passengers and property wholly by railroad between points in the State of Missouri and points in the State of Illinois and other states, and as such are subject to the provisions of the Interstate Commerce Act.

II

That the defendants, The Terminal Railroad Association, St. Louis Merchants Bridge Terminal Railway Company, The Wiggins Ferry Company, East St. Louis Connecting Railway Company, St. Louis Transfer Railway Company, Missouri and Illinois Bridge and Belt Railway Company, Granite City and Madison Belt Line Railroad Company, Illinois Traction, Inc., St. Louis Electric Terminal Railway Company and Illinois Terminal Railroad Company, have for many years and are now engaged in carrying freight, both carload and less than carload, across the Mississippi River between St. Louis, Missouri, and East St. Louis, Illinois, switching districts, as described in Agent Leland's Tariff I. C. C. No. 1702, and also across the Mississippi River between Alton, Illinois, and West Alton, Missouri; that in addition to the use of their bridges and rails across the Mississippi River in transferring the said traffic, the

[fol. 33] said defendants herein named, as well as the other defendants having lines coming into East St. Louis from the north, east and south and east of the Mississippi River, avail themselves also in transferring such traffic of the services of the following transfer companies, to-wit: Central Transfer Company, Columbia Terminals Company, Fidelity Transfer Company, and the McMahon Transfer Company; that the said Terminal Railroad Association of St. Louis, and its affiliated companies, to-wit, St. Louis Merchants Bridge Terminal Railway Company, The Wiggins Ferry Company, East St. Louis Connecting Railway Company, St. Louis Transfer Railway Company, Missouri and Illinois Bridge and Belt Railway Company, and Granite City and Madison Belt Railroad Company, and other defendants to this complaint, exact, demand and receive for their services in transporting freight across the Mississippi River between the places aforesaid, certain sums of money in the form of freight charges which vary in amounts depending upon the class or kind of traffic transported and which said charges on both through west and east bound traffic are ultimately paid and borne by the carriers, including these complainants whose lines of railroad come into St. Louis, Missouri, from the west, commonly known as the west side lines.

III

That the Terminal Railroad Association of St. Louis and its affiliated companies as hereinbefore described, are corporations and are controlled through stock ownership in equal parts by the following common carriers who are either complainants or defendants herein, to-wit:

The Baltimore and Ohio Southwestern Railroad Company,

William W. Wheelock and William G. Bierd, Receivers of The Chicago and Alton Railroad Company,

Chicago, Burlington and Quincy Railroad Company,

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company,

Illinois Central Railroad Company,

Louisville and Nashville Railroad Company,

[fol. 34] Missouri-Kansas-Texas Railroad Company,
Missouri Pacific Railroad Company,
The Pennsylvania Railroad Company,
Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company,
St. Louis Southwestern Railway Company,
Southern Railway Company,
St. Louis-San Francisco Railway Company,
Wabash Railway Company;

that the complainants herein and other carriers owning and operating lines of railroad entering St. Louis from the west for many years have paid and borne the transfer charges of the carriers named in Paragraph II herein on both east and west bound through traffic transported across the Mississippi River at the points hereinbefore mentioned and that, as a consequence thereof, the carriers owning and operating lines east of the Mississippi River at the said points do not pay and bear any part of the transfer charges so collected by the companies named in Paragraph II herein on either westbound or eastbound through traffic, that is to say, westbound traffic destined to points beyond the St. Louis switching district and eastbound traffic destined to points beyond the East St. Louis switching district; that the carriers operating lines east of the Mississippi River, own and control a majority of the stock of the said Terminal Railroad Association of St. Louis and its affiliated companies, and by reason thereof, the said carriers, defendants herein, have succeeded in forcing these complainants as west side lines to pay and ultimately bear the said transfer charges on both eastbound and westbound through traffic across the Mississippi River at the said points; that for many years these complainants have sought and endeavored by every means at their command to relieve themselves of the undue burden of paying the said transfer charges on both eastbound and westbound through traffic across the Mississippi River at the points aforesaid, but the defendants herein have failed, neglected and refused to participate in paying any part of the said charges, either on westbound or on eastbound through traffic; that these complainants are without remedy unless and until this Commission intervenes and requires the east side lines to bear a proper portion thereof.

[fol. 35] IV

That under the present practice in effect at the St. Louis and East St. Louis gateway and between Alton, Illinois, and West Alton, Missouri, these complainants and other west side lines are compelled to and do assume the burden of effecting delivery of all eastbound through traffic at points on the east side of the Mississippi River and are compelled to and do assume the burden of accepting and receiving all westbound through traffic also at points on the east side of the Mississippi River, that is to say, at the present time the point of interchange between the west side lines, on the one hand, and the east side lines, on the other, as to all through traffic, whether eastbound or westbound, passing through the St. Louis-East St. Louis gateway and West Alton, Missouri, is at points on the east side of the Mississippi River; that these complainants and other west side lines pay and bear the charges incurred by the intermediary lines herein described for transporting the said traffic, both eastbound and westbound, across the Mississippi River as hereinbefore described; that the said practice of requiring these complainants and other west sides lines to assume the burden of delivering through eastbound traffic at points on the east side of the Mississippi River and to accept and receive all westbound through traffic at points on the east side of the Mississippi River, and to pay and ultimately bear the transfer charges for all the said through westbound and eastbound traffic through said gateways, is unjust, unreasonable, unduly preferential, unjustly discriminatory and unduly prejudicial, unlawful and illegal within the meaning of those terms as used in the Interstate Commerce Act, as between these complainants and other west side lines, on the one hand, and the defendants, on the other; that under a proper, just, reasonable, lawful, non-prejudicial and non-preferential practice, the defendants herein owning or operating railway lines east of the Mississippi River, to-wit, the carriers referred to herein as the east side lines, should assume the burden of and effect delivery of all through westbound traffic at St. Louis, Missouri, and at West Alton, Missouri, and should pay and ultimately bear the transfer charges thereon; that under a proper, just, reasonable, lawful, non-
[fol. 36] prejudicial and non-preferential practice, the point of interchange as to all through westbound traffic should be

on the west side of the Mississippi River; that by reason of the facts herein stated, these complainants have been subjected severally and jointly to the payment of transfer charges for the transportation of freight as aforesaid across the Mississippi River, which were, when exacted, and still are, unjust, unreasonable, unlawful, unduly prejudicial and unduly preferential, in violation of the provisions of the Interstate Commerce Act applicable thereto.

V

That while the east side lines have terminals on the west bank of the Mississippi River for handling local traffic destined to or originating at St. Louis, Missouri, by virtue of the instrumentalities of the Terminal Railroad Association of St. Louis and the latter's affiliated and subsidiary properties, and of the various transfer companies heretofore cited, they assume to have no such terminals or instrumentalities on the west bank for delivering to or receiving from their connections traffic passing through St. Louis, Missouri, or West Alton, Missouri, destined to points beyond; that said east side lines have failed, neglected and refused and they do now fail, neglect and refuse to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, all in violation of the duties imposed upon them by the Interstate Commerce Act.

VI

That the failure, neglect and refusal of the said defendants herein to bear the burden of and to effect delivery on the west side of the Mississippi River of all through westbound traffic and to bear and pay the transfer charges for transporting the same across the said Mississippi River, for two years next preceding the filing of this complaint, has resulted in damages to each of these complainants and that, by reason thereof, each of these complainants has been injured to its damage in the sum of not less than Five Hundred Thousand Dollars ($500,000) or in the aggregate the sum of Two Million Dollars ($2,000,000).

[fol. 37]

VII

That the failure, neglect and refusal of the said defendants herein to provide reasonable facilities for operating

through routes for westbound traffic passing through St. Louis, Missouri, and West Alton, Missouri, and to make reasonable rules and regulations with respect to the operation of said through routes for two years next preceding the filing of this complaint have resulted in damages to each of these complainants and that, by reason thereof, each of these complainants has been injured to its damage in the sum of not less than Five Hundred Thousand Dollars ($500,000) or in the aggregate the sum of Two Million Dollars ($2,000,000).

VIII

Wherefore, these complainants pray that the defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding the defendants to cease and desist from the aforesaid practices as hereinbefore described; that the defendant east side lines be required to pay and bear the transfer charges on all westbound traffic through said gateways and be required to effect delivery thereof to the west side lines at the St. Louis switching district and at West Alton, Missouri, or on the west side of the river; that the defendants herein described as east side lines be required to provide reasonable facilities for operating through routes through St. Louis, Missouri, East St. Louis, Illinois, and West Alton, Missouri, Alton, Illinois, and to make reasonable rules and regulations therefor; that the defendants referred to herein as the east side lines be required to pay to each of the complainants by way of damages for the unlawful practices hereinbefore set forth such sums as in view of the evidence adduced herein the Commission shall determine that each of the complainants is entitled to and that the Commission make such further or other orders herein as the facts herein set forth and the evidence introduced at the hearing may warrant under the law applicable thereto.

Dated this 3rd day of February, 1925.

Chicago, Rock Island and Pacific Railway Company, by Wallace T. Hughes, Its Attorney, 1025 La Salle St. Station, Chicago, Illinois. Missouri-[fols. 38-55] Kansas-Texas Railroad Company, by C. S. Burg, Its Attorney, Railway Exchange Bldg., St. Louis, Missouri. Missouri Pacific Railroad

Company, by H. H. Larimore, Its Attorney, Railroad Exchange Bldg., St. Louis, Missouri. St. Louis-San Francisco Railway Company, by M. G. Roberts, Its Attorney, 1025 Frisco Building, St. Louis, Missouri.

St. Louis, Mo., February 3, 1925.

[fol. 56] Exhibit No. 4 to Bill of Complaint

Order

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 4th Day of October, A. D. 1926.

No. 16697

Chicago, Rock Island & Pacific Railway Company et al.

v.

Baltimore & Ohio Railroad Company et al.

Upon petition of defendants for reargument and reconsideration, and upon further consideration of the record in the above-entitled proceeding:

It is ordered, That said petition be, and it is hereby, denied.

By the commission:

George B. McGinty, Secretary. (Seal.)

Exhibit No. 5 to Bill of Complaint

Eastman, Chairman, dissenting:

I am not persuaded that the conditions of which complaint is made in this case constitute a "practice" within the meaning of paragraph (6) or (11) of section 1 or paragraph (1) of section 15 of the interstate commerce act. Such an interpretation seems to me to be precluded by United States v. Pennsylvania Railroad Company, 242 U. S. 208, where it was held, in substance, that the word must

be confined to matters which affect shippers as distinguished from matters which affect only carriers, that is, matters which confuse the relations between shippers and carriers, or burden transportation, or favor a large shipper and oppress a small one.

But assume that the contrary is true, and that we have here an issue over which we have jurisdiction. Whose "practice" is it which is attacked in this case? In dis- [fol. 57] cussing that question I shall refer only to the through traffic which moves on combination rates, for as to the traffic which moves on joint rates the real complaint seems to me to relate clearly to divisions and nothing else, and the divisions are not brought in issue.

The report of the majority is based on the theory that the "practice" attacked is a "practice" of the east-side defendant lines alone. I can find no solid foundation for this theory. It is true that the tariffs of the east-side lines contain a provision to the effect that where no joint rates are provided and the combinations are the same on St. Louis as on East St. Louis, through rates shall be made on the East St. Louis combination. But the west-side lines had precisely as much right to publish a provision in their tariffs that in such cases the through rates should be made on the St. Louis combinations. They did not do so, but allowed the tariffs of the east-side lines to prevail on this point. Why? Apparently because they feared the competition of the Chicago & Alton, which receives traffic from the east-side lines as a matter of necessity at East St. Louis.

It must be borne in mind that the west-side lines originate more of the through traffic than do the east-side lines. Potentially, from a traffic standpoint, they are more powerful factors in the situation than the east-side lines and in a better position to impose their will. Why do they not do so, instead of turning to us for relief? Certainly not because of any inherent power which the eastern lines possess to dominate the situation by a "practice." The fair deduction is that the competition of the Chicago & Alton is the reason, and this deduction is supported by history. Through rates were made as they now are made, as I understand the record, beginning with the construction of the Chicago & Alton into East St. Louis in 1877, and long before the

east-side lines extended their local East St. Louis rates across the river to St. Louis.

If the west-side lines are dissatisfied with existing conditions, let them withdraw from the "practice" attacked, provide in their tariffs for the "practice" which they desire, and refuse to absorb the charges of the Terminal Association on west-bound traffic. There would then be an [fol. 58] issue with which we probably should have to deal; but no such issue now exists and, as I see it, the "practice" in question is as much a "practice" of the west-side lines as it is of the east-side lines.

But even if there were here a "practice" of the east side lines alone, what evidence is there that it is unreasonable? The mere fact that reciprocal deliveries are quite common throughout the country does not prove it to be unreasonable. Yet that is practically the only evidence presented.

I am authorized to say that Commissioners Hall and Woodlock concur in this expression of dissent.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTING CAUSE FOR HEARING—November 16, 1926

The undersigned, Judge of the District Court of the United States, in and for the Northern District of Illinois, the Eastern Division, having been advised that a bill in the above styled cause has been filed in the District Court of the United States, in and for the Northern District of Illinois, Eastern Division, wherein there is sought to have canceled, annulled, and set aside an order of the Interstate Commerce Commission, and wherein an injunction is sought to restrain the Interstate Commerce Commission from enforcing the said order, hereby calls to his assistance to hear and determine the application of the plaintiffs for the said injunction the Honorable Albert B. Anderson, Circuit Court Judge, and the Honorable James H. Wilkerson and Adam C. Cliffe, District Judge, for the purpose of hearing said application. And the undersigned District Judge hereby fixes Chicago, Illinois, and the 29th day of November, 1926,

at 10 o'clock A. M., in the Federal Building at Chicago, Illinois, and in the Court Room usually occupied by the undersigned, as the time and place for hearing said application.

It is further ordered, that a copy of this order be forwarded to each of the said Judges so designated and that [fol. 59] the Clerk of the District Court of the United States, Northern District of Illinois, Eastern Division, forward by mail notice of the fact, time, and place of the said hearing to the Secretary of the Interstate Commerce Commission, at Washington, D. C., and to the Attorney General of the United States, at Washington, D. C., as required by statute, which notice shall be accompanied by a copy of this order.

Witness my hand this 16th day of November, 1926.

James H. Wilkerson, Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES—Filed November 20, 1926

United States of America, by its counsel, now comes and for answer to the bill of complaint filed herein against it says:

I, II, III. On information and belief defendant admits the allegations of paragraphs I, II and III.

IV. On information and belief defendant admits that the so-called West Side Lines, on or about February 5, 1925, filed the complaint with the Interstate Commerce Commission against the East Side Lines and, subject to verification, Exhibit E, attached to and made a part of the bill of complaint, is a true copy. Defendant neither admits nor denies the allegations of paragraph IV with respect to the contents of the complaint before the Commission but for greater certainty refers to the complaint in its entirety for the full and true contents thereof.

V. On information and belief defendant admits the allegations of paragraph V with this exception: defendant has no knowledge of the contents of the answers filed by the several carriers who were defendants to the complaint before the Commision, it neither admits nor denies the allegations with respect thereto and if the same become material upon the hearing it will require strict proof thereof.

[fol. 60] VI, VII, VIII. On information and belief defendant admits the allegations of paragraph VI, VII and VIII.

IX. On information and belief defendant admits the allegations of paragraph IX and, subject to verification, that Exhbit No. 5 is a true copy of the dissenting opinion of Commissioner Eastman concurred in by Commissioners Hall and Woodlock.

X, XI, XII, XIII, XIV, XV. Except as shown by the report of the Commission, Exhibit No. 1 to the bill of complaint, defendant has no knowledge of the matters and things alleged in paragraphs X, XI, XII, XIII, XIV and XV in manner and form as alleged and in so far as the same conflict wth the facts found by the Commission in its report this defendant denies the same and each and every part of the same.

XVI. Defendant denies the allegations of paragraph XVI and each and every part of the same in manner and form as alleged. Specifically defendant denies the charges in sub-paragraph (3) that "there was no evidence before the Interstate Commerce Commission in said cause which would enable the Commission to determine whether such 'practice' was in any respect unreasonable or unjust, or would support or tend to support the finding * * * that such 'practice' was unjust and unreasonable." Specifically defendant denies the charges in sub-paragraphs (4) and (5) that the order of the Commission is without any evidence to support it and is arbitrary.

XVII. Defendant has no knowledge of the matters and things alleged in paragraph XVII in manner and form as alleged and if the same become material upon the hearing it will require strict proof thereof with this exception: defendant admits that for the nonobservance of any valid order of the Commission its officers will take appropriate

action to compel the observance thereof in accordance with the statute in such case made and provided.

Further answering, defendant alleges that the matters and things set forth in the bill of complaint and sought to be put in issue before the court were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and [fol. 61] determine under the provisions of the Interstate Commerce Act; in its report in writing with respect thereto, made after full hearing and on due notice to all of the parties, which states its conclusion together with its decision, order or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence before the Commission of which the parties were advised.

Defendant alleges that the facts set forth in the report of the Commission and each and all of the same are true and correct.

Defendant specifically denies—

(a) Any fact or facts alleged in the bill of complaint, or any part of the same, which are inconsistent with any fact or facts found by the Commission.

(b) Any and all inferences of fact from any particular fact or facts alleged in the bill of complaint, or any part of the same, which seek to deny, or which are inconsistent with any fact or facts found by the Commission.

(c) Any fact or facts alleged in the bill of complaint, or any part of the same, which deny, or which seek to deny, any fact or facts found by the Commission.

(d) Any fact of facts alleged in the bill of complaint, or any part of the same, which set up, or which seek to set up, matters and things which were not before the Commission.

(e) Any fact or facts alleged in the bill of complaint, or any part of the same, which attack of which seek to attack the action of the Commission, and to show facts other than what the Commission has found and reported.

(f) Any allegations in the bill of complaint, or any part of the same, which allege that facts were found by the Com-

mission in its report and orders which, as shown on the face thereof, were not so found.

(g) Any conclusions of law alleged and insisted upon in the bill of complaint, or any part of the same, which are inconsistent with any conclusions of law held by the Interstate Commerce Commission.

[fol. 62] (h) Each and every allegation in the bill of complaint contained not herein specifically admitted or denied.

Wherefore, having fully answered, defendant prays that the bill of complaint be dismissed at the cost of plaintiffs and for such other and further order as may be appropriate.

Blackburn Esterline, Assistant to the Solicitor General, United States Attorney.

Duly sworn to by Blackburn Esterline. Jurat omitted in printing.

[File endorsement omitted.]

In United District Court

[Title omitted]

Intervention of Interstate Commerce Commission—Filed November 22, 1926

To the Honorable the Judges of said court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, we hereby enter the appearance of the Interstate Commerce Commission, as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

P. J. Farrell, J. Stanley Payne.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Answer of Interstate Commerce Commission—Filed November 22, 1926

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, hereinafter called the [fol. 63] Commision, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' bill of complant contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

Answering Paragraphs I to III, inclusive, of the bill of complaint, the Commission admits, for the purposes of this suit, that the allegations therein contained are true.

Answering Paragraphs IV to XVII, inclusive, of the bill of complaint, the Commission admits and alleges that it made the report and order of July 12, 1926, referred to in Paragraph VI, in a proceeding then pending before it and numbered 16697 on the Commission's docket; that the order by its terms, as amended, is to become effective on December 11, 1926; that the complainants in said proceeding were The Chicago, Rock Island and Pacific Railway Company, the Missouri-Kansas-Texas Railroad Company, the Missouri Pacific Railroad Company, and the St. Louis-San Francisco Railway Company; that the plaintiffs herein were defendants in said proceeding; that the order was duly served upon said plaintiffs, and that the report and order are Exhibit 1 to the bill of complaint herein.

The Commission further admits and alleges that, prior to the making and serving of said report and order, as aforesaid, it accorded to the parties to said proceeding, including the plaintiffs herein, the full hearing provided for in the Interstate Commerce Act; that at said hearing a large volume of testimony and other evidence bearing upon the matters covered by said report and order was submitted to the Commission for consideration on behalf of said parties by their respective counsel; that at said hearing and subsequently, both orally and in briefs filed in said

proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and made and entered said report and order, which included the Commission's decisions, conclusions, orders, and requirements in the premises; that upon the evidence before it in said proceeding, and as shown in and by said report and [fol. 64] order, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence before the Commission in said proceeding.

The Commission further alleges that in making said report and order, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including matters covered by the allegations of the bill of complaint herein.

The Commission further alleges that said order was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner, and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint.

The Commission particularly denies the allegation in subdivision 4 of Paragraph XVI that the order of July 12 is without evidence to support it, and the allegation in subdivision 5 of said paragraph that the order is arbitrary, and also denies the allegations in Paragraph XVII to the effect that said order, if it is not annulled and set aside, will subject the plaintiffs to irreparable damage and injury.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said bill of complaint, in so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said report and order of the Commission which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission, by P. J. Farrell, J. Stanley Payne, Counsel.

[fol. 65] *Duly sworn to by Johnston B. Campbell. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY—Filed Nov. 29, 1926

To the Honorable the Judges of said Court:

We hereby enter the appearance of The Chicago, Rock Island and Pacific Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and St. Louis-San Francisco Railway Company, as interveners, and of ourselves as their counsel in the above entitled suit.

W. F. Dickinson, Wallace T. Hughes, A. B. Enoch, C. S. Burg, H. H. Larimore, M. G. Roberts.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENERS—Filed November 29, 1926

The above named interveners in the above-entitled suit reserving to themselves and to each of them all manner of

benefit and advantage of exception to the many errors and insufficiencies in the bill of complaint, for answer thereunto, or unto so much or such parts thereof as they are advised that it is material for them to answer, say:

[fol. 66] I

Interveners admit the allegations of Paragraphs I, II, and III of the complaint.

II

Answering Paragraph IV, interveners admit the filing of the complaint before the Interstate Commerce Commission as attached to bill of complaint and marked Exhibit No. 3.

III

Interveners admit the allegations of Paragraphs V, VI, VII, VIII and IX.

IV

Answering Paragraph X of the complaint, interveners admit plaintiffs are common carriers by railroad subject to the Interstate Commerce Act, and as such, participate in westbound traffic through East St. Louis, Illinois, and St. Louis, Missouri. That the order of the Interstate Commerce Commission, hereinafter called the "Commission," applies to westbound traffic, but interveners allege that the order of the Commission referred to in bill of complaint applies only to traffic where the same moves on combination rates which are the same on St. Louis as East St. Louis, and interveners deny that the question of plaintiffs' rates to East St. Louis is in issue as set out and pleaded in said Paragraph X.

V

Answering Paragraph XI, interveners deny that since 1887 they have voluntarily published and applied to and from East St. Louis rates the same as to and from St. Louis as to westbound traffic passing through said points, but allege that for many years last past interveners have paid and born the charges of the Terminal Railroad Association of St. Louis on both eastbound and westbound

through traffic passing through St. Louis, Missouri, and East St. Louis, Illinois, because forced so to do account the arbitrary action of said Terminal Railroad Association of St. Louis which these plaintiffs through stock ownership control.

[fol. 67]

VI

Answering Paragraph XII, interveners deny that if the payment by west side lines of the transfer charges on both eastbound and westbound through traffic at St. Louis, Missouri, and East St. Louis, Illinois, be not a practice as pleaded in said Paragraph XII, that the Commission is without power to make the order complained of. Interveners also deny that the Commission has misconceived the meaning of the word "practice" as contained in the Interstate Commerce Act, and deny that said order is based upon a mistake of law. Deny the same as null and void, and deny that the order complained of is beyond the power of the Commission to make.

VII

Answering Paragraph XIII, the interveners allege that the question of the reasonableness of the transfer charge applicable on westbound traffic crossing the Mississippi River at St. Louis, Missouri, and East St. Louis, Illinois, is not in issue, or the apportionment of those charges. That plaintiffs having voluntarily extended their lines to St. Louis, Missouri, through use of the rails of the Terminal Railroad Association of St. Louis, are required by the order to deliver westbound through traffic to interveners at the end of plaintiffs rail in St. Louis, Missouri.

VIII

Answering Paragraph XIV, interveners state that the allegations thereof are not material to this inquiry or controversy.

IX

Answering Paragraph XV, interveners allege that the question of whether the rates of plaintiffs apply up to East

St. Louis should be reduced, is not in issue. That plaintiffs have through their subsidiary, the Terminal Railroad Association of St. Louis, voluntarily extended their rails to St. Louis, Missouri, and that the order of the Commission only covers transfer charges on traffic westbound through St. Louis and East St. Louis on which rates are combina-
[fols. 68 & 68½] tion rates which are the same on St. Louis as on East St. Louis

X

Interveners deny the allegations of Paragraph XVI.

XI

Answering Paragraph XVII, interveners deny that plaintiffs will suffer great and irreparable damage and injury to them and each of them. Deny that plaintiffs are entitled to the relief sought, or any part thereof. Deny that complainants are entitled to any relief and pray that Bill of Complaint be dismissed.

W. F. Dickinson, Wallace T. Hughes, A. B. Enoch, C. S. Burg, H. H. Larimore, M. G. Roberts, Counsel for Interveners.

Duly sworn to by Arthur Mackenzie. Jurat omitted in printing.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Order Dismissing Bill of Complaint—December 8, 1926

This day again come the parties to this suit by their attorneys respectively and the Court being now fully advised in the premises it is ordered that the bill of complaint filed in said cause be and the same is hereby dismissed for want of equity.

[fol. 68a] File No. 32856

SUPREME COURT OF THE UNITED STATES No. 404, OCTOBER TERM, 1927

THE BALTIMORE & OHIO RAILROAD COMPANY, WILLIAM W. WHEELOCK and WILLIAM G. BIERD, Receivers, etc., et al.,

vs.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE Commission, and Chicago, Rock Island & Pacific Railway Company et al.

MANDATE—Filed in D. C. U. S. June 11, 1928

[File endorsement omitted.]

[fol. 69] UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Illinois, before you or some of you, in the cause between The Baltimore & Ohio Railroad Company, William W. Wheelock and William G. Bierd, Receivers of the Chicago & Alton Railroad Company et al., plaintiffs, and the United States of America, defendant, Interstate Commerce Commission, The Chicago, Rock Island & Pacific Railway Company et al., interveners wherein the decree of the said District Court entered in said cause on the 8th day of December, A. D. 1926, is in the following words:

"This day again come the parties to this suit by their attorneys respectively, and the Court being now fully advised in the premises, it is ordered that the bill of complaint filed in said cause be, and the same is hereby, dismissed for want of equity."

as by an inspection of the transcript of the record of the said District Court which was brought into the Supreme

Court of the United States by virtue of an appeal agreeable to the Act of Congress in such case made and provided, fully and at large appears.

And, whereas, in the present term of October in the year of our Lord, 1927, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of said District Court in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the [fol. 70] United States for the Northern District of Illinois for further proceedings, in conformity with the opinion of this Court.

May 21, 1928.

You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 8th day of June, in the Year of Our Lord, 1928.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 71] In United States District Court

[Title omitted]

Motion for Decree in Accordance with the Mandate and for Order of Restitution—Filed June 21, 1928

To the Honorable the Judges of the District Court of the United States in and for the Eastern Division of the Northern District of Illinois:

I

The plaintiffs hereby move the court to enter a decree in conformity with the mandate of the Supreme Court of

the United States dated June 8th, 1928 and filed herein June 11th, 1928 in substance as shown by the draft of decree hereto annexed.

II

The plaintiffs further move that the court after due consideration render a decree against the intervenors, The Chicago, Rock Island & Pacific Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company, and St. Louis-San Francisco Railroad Company, severally, to restore to the respective plaintiffs the amounts paid by said plaintiffs for the benefit of said intervenors because of the erroneous decree entered herein by this court December 8th, 1926. Plaintiffs in support of this branch of the motion aver that because of the dismissal by this Court at that time of its Bill of Complaint herein instead of a decree to set aside and enjoin the en- [fol. 72] forcement of the order of the Interstate Commerce Commission in its Docket No. 16697 as prayed in plaintiffs' Bill of Complaint herein, plaintiffs were compelled to and did comply with the said order of the Interstate Commerce Commission and from the effective date of said order as amended, to-wit: December 11th, 1926, said plaintiffs have paid on westbound freight passing through both East St. Louis, Illinois and St. Louis, Missouri, on combination rates which are the same on St. Louis as on East St. Louis, and delivered to the said intervenors, the charges for transfer services from plaintiffs' lines in East St. Louis, Illinois to the lines of intervenors in St. Louis, Missouri. If this Court had then entered the decree which the Supreme Court has adjudged it should have entered, the intervenors would have paid said charges, and they have therefore benefited from the erroneous decree of this court by the amount thereof. The amount of restitution due the several plaintiffs from the several intervenors is not now known and is not ascertainable without an accounting and until after the termination of such payments following the entering of the decree herein sought to be entered.

III

Plaintiffs move for an order of reference to a Master for the ascertainment of the amount of restitution properly to

be made by the several interveners to the several plaintiffs.

IV

Plaintiffs move for such further orders and proceedings, in conformity with the opinion and decree of the Supreme Court, as according to right and justice and the laws of the United States ought to be had.

Dated at Chicago, Illinois, June 21, 1928.

D. P. Connell, Homer T. Dick, W. A. Northcutt, W. N. McGehee, Elmer A. Smith, Louis N. Strasser, W. J. Stevenson, Frank H. Towner, Morison R. Waite, Guernsey Orcutt, Robert W. Richards, Theodore Schmidt, Solicitors for Plaintiffs.

[fol. 73] In United States District Court

The Baltimore and Ohio Railroad Company et al., Plaintiffs,

vs.

United States of America, Defendant

In Equity. No. 6548.

Decree—June 21, 1928

This cause came on to be further heard at this term before the Honorable Samuel Alschuler and the Honorable Albert B. Anderson, Circuit Judge of the United States for the Seventh Circuit, and the Honorable James H. Wilkerson, Judge of the District Court of the United States for the Northern District of Illinois, in accordance with the statutes in such case made and provided, upon the motion of the plaintiffs herein for a decree in accordance with the mandate of the Supreme Court of the United States dated the eighth day of June, 1928, and filed herein the eleventh day of June, 1928, and for an order of restitution, due and timely notice of which hearing has been given to the defendant and the intervenors herein; and the Court, after hearing the evidence and arguments of counsel, upon con-

sideration thereof and of the opinion and mandate of the Supreme Court herein, and being fully advised in the premises, finds that, in accordance with the said opinion and mandate of the Supreme Court, the decree of this Court entered herein on the eighth day of December, 1926, dismissing the bill of complaint herein for want of equity should be vacated, set aside and annulled and the relief prayed for in the said bill should be granted by this Court. [fol. 74] The Court further finds that the evidence before the Interstate Commerce Commission in the proceeding before it entitled: The Chicago, Rock Island & Pacific Railway Company, et al., vs. The Baltimore & Ohio Railroad Company et al., numbered 16697 on its docket, does not support or justify the order of said Commission entered therein on the twelfth day of July, 1926, and thereafter amended by the said Commission; that the word "practice" as used in the provisions of the Interstate Commerce Act relied upon by the said Commission in its said order, being paragraphs (6) and (11) of section 1 and paragraph (1) of section 15, does not include or refer to the method or basis used by connecting carriers for their divisions of rates and revenues; and that the said order of the said Commission cannot be sustained and should be enjoined, set aside and annulled.

The Court further finds that continuously from and after the eleventh day of December, 1926, being the effective date of the said order of the said Commission, the plaintiffs herein, under and by virtue and in consequence of the said order of the said Commission, bore, absorbed and paid, and are now bearing, absorbing and paying, the charges for transfer services from East St. Louis, Illinois to St. Louis, Missouri, on westbound freight traffic passing through both points on combination rates which are the same on St. Louis as on East St. Louis, and that the said plaintiffs by their said motion herein ask for an order of this Court herein for restitution of said charges by the said several intervening railroad companies to the said several plaintiffs.

It is therefore ordered, adjudged and decreed as follows, viz:

1. That the decree of this Court entered herein on the eighth day of December, 1926, dismissing the bill of com-

plaint herein for want of equity be, and it is hereby, va-
[fol. 75] cated, set aside and annulled.

2. That the said order of the Interstate Commerce Commission entered by it on the twelfth day of July, 1926, as thereafter amended by the said Commission, in the proceeding before it entitled: The Chicago, Rock Island & Pacific Railway Company et al., against The Baltimore & Ohio Railroad Company et al., numbered 16697 on its docket, be, and the same is hereby enjoined, set aside and annulled in whole, and the said defendant, United States of America, the said intervenor, Interstate Commerce Commission, the said intervening railroad companies, The Chicago, Rock Island & Pacific Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company, the successors, officers, agents, employees and servants of each of said parties, and all other persons, are and each of them is hereby perpetually restrained and enjoined from commencing or prosecuting any suit, prosecution or proceeding in any court of law or equity to enforce or attempt to enforce the said order or any part thereof.

3. That this Court retains jurisdiction of this cause and of the parties thereto, to the end that such other and further proceedings may be had and such other and further orders and decrees may be entered herein with respect to restitution, costs, and any and all other proper matters, as are according to right and justice and the laws of the United States.

Enter: Samuel Alschuler, Albert B. Anderson, James H. Wilkerson, Judges.

June 21, 1928.

Approved: W. F. Dickinson, for the intervening railroad companies. Theodore Schmidt, for the plaintiffs.

[fol. 76] In United States District Court

[Title omitted]

Wilkerson, J.; Anderson, J.; Alschuler, J., sitting en banc.

ORDER DENYING MOTION FOR RESTITUTION AND FOR REFERENCE TO A MASTER—Oct. 5, 1928

The Court having heretofore heard the arguments of Counsel on the plaintiff's motion filed June 21st, A. D. 1928, relating to restitution, and being now fully advised in the premises, it is ordered, adjudged and decreed that the motion of the plaintiff for restitution and for a reference to a Master be and the same is hereby overruled and denied.

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed Nov. 3, 1928

Now come the above named plaintiffs, The Baltimore and Ohio Railroad Company, William W. Wheelock and William G. Bierd, Receivers of the Chicago and Alton Railroad Company, Chicago and Eastern Illinois Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Illinois Traction, Inc., Illinois Central Railroad Company, Litchfield and Madison Railway Company, Louisville and Nashville Railroad Company, Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Southern Railroad Company and Wabash Railway Company, and feeling themselves aggrieved by the following order rendered and entered by the Honorable Samuel Alschuler and the Honorable Albert B. Anderson, Circuit Judges of the United States for the Seventh Circuit, and the Honorable James H. Wilkerson, Judge of the District Court of the United States for the Northern District of Illinois, sitting in this court in accordance with the statutes in such case made and provided, in the above-entitled cause on the 5th day of October, A. D. 1928:

[fol. 78] "The Court having considered the portion of plaintiffs' motion filed June 21st, 1928, relating to restitution, It is ordered, adjudged and decreed that the motion of plaintiffs for restitution and for a reference to a master be and it hereby is denied,"

do hereby appeal from said order to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith.

Wherefore said plaintiffs pray that their appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said order was based, duly authenicated, be sent to the Supreme Court of the United States under the rules of said court in such cases made and provided; and that the proper order relating to security to be required of them be made.

The Baltimore and Ohio Railroad Company, by Morison R. Waite, Its Solicitor, William W. Wheelock and William G. Bierd, Receivers of the Chicago and Alton Railroad Company, by Silas H. Strawn & Frank H. Towner, Their Solicitors. Chicago and Eastern Illinois Railway Company, by K. L. Richmond, Its Solicitor. The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, by D. P. Connell, Its Solicitor. Illinois Traction, Inc., by James A. Knowlton, Its Solicitor. Illinois Central Railroad Company, by Elmer A. Smith, Its Solicitor. Litchfield and Madison Railway Company, by Morison R. Waite, Its Solicitor. Louisville and Nashville Railway Company, by W. A. Northcutt, Its Solicitor. Mobile and Ohio Railroad Company, by W. N. McGehee, Its Solicitor. The New York, Chicago and St. Louis Railroad Company, by W. J. Stevenson, Its Solicitor. The
[fol. 79] Pennsylvania Railroad Company, by Theodore Schmidt, Its Solicitor. Southern Railroad Company, by W. N. McGehee, Its Solicitor. Wabash Railway Company, by L. H. Strasser, Its Solicitor.

[fol. 80] In United States District Court

[Title omitted]

Assignment of Errors—Filed Nov. 3, 1928

Now come the said plaintiffs, The Baltimore and Ohio Railroad Company, William W. Wheelock and William G.

Bierd, Receivers of the Chicago and Alton Railroad Company, Chicago and Eastern Illinois Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Illinois Traction, Inc., Illinois Central Railroad Company, Litchfield and Madison Railway Company, Louisville and Nashville Railroad Company, Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Southern Railroad Company and Wabash Railway Company, in the above entitled cause and in connection with their petition for an appeal to the Supreme Court of the United States hereby assign error to the record and proceedings and to the entry of the order of said District Court of the 5th day of October, A. D. 1928 in the above entitled cause and say that said order is erroneous and to the prejudice of the said plaintiffs in the following particulars:

1. The court erred in denying the motion of said plaintiffs for restitution from the defendant railroad companies upon the reversal by the Supreme Court of the United States of the former decree of the District Court dismissing the bill of complaint herein.

[fol. 81] 2. The court erred in denying the motion of said plaintiffs for said restitution and for reference to a master to ascertain the amounts due to the several plaintiffs in restitution from the several defendant railroad companies.

3. The court erred in denying the motion of plaintiffs for reference to a master to ascertain the amounts of restitution due the several plaintiffs from the several defendant railroad companies.

4. The court erred in denying the motion of plaintiffs for the ascertainment of the amounts due said plaintiffs, respectively, from said defendant railroad companies, respectively, and for restitution of said several amounts.

5. The court erred in denying the motion of plaintiffs for an accounting or other appropriate proceeding for the ascertainment of the amounts due the said several plaintiffs from the said several defendant railroad companies and for an order of restitution of said several amounts.

6. The court erred in failing to enter such order or orders with respect to restitution herein as was and is according to right and justice and the laws of the United States.

Wherefore, the said plaintiffs pray that said order entered herein on the 5th day of October, A. D. 1928 be reversed and that said District Court be ordered and directed to enter an order vacating, setting aside and anulling its said order and to ascertain the amounts of restitution due to the several plaintiffs from the several defendant railroad companies, and ordering the payment and restitution of said several amounts, and granting such other and further relief as to equity shall appertain.

Morison R. Waite, K. L. Richmond, W. J. Stevenson, Silas H. Strawn, Frank H. Towner, W. N. McGehee, D. P. Connell, L. H. Strasser, James A. Knowlton, Elmer A. Smith, Theodore Schmidt, W. A. Northcutt, Solicitors for Plaintiffs.

[fols. 82-84] Bond on appeal for 500.00 approved and filed Nov. 3, 1928, omitted in printing.

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—NOV. 3, 1928

This day came the above named plaintiffs, The Baltimore and Ohio Railroad Company, William W. Wheelock and William G. Bierd, Receivers of the Chicago and Alton Railroad Company, Chicago and Eastern Illinois Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Illinois Traction, Inc., Illinois Central Railroad Company, Litchfield and Madison Railway Company, Louisville and Nashville Railroad Company, Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Southern Railroad Company and Wabash Rail-

way Company, and filed their petition for an appeal and an assignment of errors, on consideration of which

It is hereby ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the following order, rendered and entered by the Honorable Samuel Alschuler and the Honorable Albert B. Anderson, Circuit Judges of the United States for the Seventh Circuit, and the Honorable James H. Wilkerson, Judge of the District Court of the United States for the Northern District of Illinois, sitting in this court in accordance with the statutes in such case made and provided, in the above [fol. 86] entitled cause, on the 5th day of October, A. D. 1928:

"The Court having considered the portion of plaintiffs' motion filed June 21st, 1928, relating to restitution, It is ordered, adjudged and decreed that the motion of plaintiffs for restitution and for a reference to a master be and it hereby is denied."

It is further ordered that a certified transcript of the record, stipulations and all proceedings relating to said order be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars ($500).

Enter:

Albert B. Anderson, Circuit Judge.

November 3, 1928.

[fol. 87] In United States District Court

[Title omitted]

Praecipe for Transcript of Record

To the Clerk of said Court:

In the preparation of the transcript of record on appeal to the Supreme Court of the United States in the above entitled cause you will include the following portions of the record in the transcript:

1. Bill of complaint (with exhibits) filed herein.

2. All answers to the bill filed herein by defendant and intervenors.

3. Decree entered in this court by three judges on December 8, 1926, dismissing bill for want of equity.

4. The mandate of the Supreme Court of the United States, dated June 8, 1928, and filed in this court June 11, 1928, reversing decree of December 8, 1926.

5. Plaintiffs' motion for decree in accordance with the mandate, and for order of restitution and other relief, filed herein on June 21, 1928.

6. Decree entered in this court on June 21, 1928, by Circuit Judges Alschuler and Anderson and District Judge Wilkerson.

7. Order entered by said three Judges on October 5, 1928.

8. Any opinions delivered in said case subsequently to the filing of said mandate of the Supreme Court of the United States.

9. Petition for appeal to the Supreme Court of the United States.

10. Assignment for errors filed with said petition for appeal.

11. Bond on appeal.

[fol. 88] 12. Order allowing said appeal.

13. Any orders of this court made in the above entitled cause subsequently to October 5, 1928, and not herein enumerated.

14. Praecipe for record on appeal and acknowledgment of service thereof.

15. Citation and return of service.

The Baltimore and Ohio Railroad Company, by Morison R. Waite, Its Solicitor. William W. Wheelock and William G. Bierd, Receivers of the Chicago and Alton Railroad Company, by Frank

H. Towner, Their Solicitor. Chicago and Eastern Illinois Railway Company, by K. L. Richmond, Its Solicitor. The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, by D. P. Connell, Its Solicitor. Illinois Traction, Inc., by James A. Knowlton, Its Solicitor. The Pennsylvania Railroad Company, by Theodore Schmidt, Guernsey Orcutt, Its Solicitors. Southern Railroad Company, by W. N. McGehee, Its Solicitor. Illinois Central Railroad Company, by Elmer A. Smith, Its Solicitor. Litchfield and Madison Railway Company, by Morison R. Waite, Its Solicitor. Louisville and Nashville Railroad Company, by W. A. Northcutt, Its Solicitor. Mobile and Ohio Railroad Company, by W. N. McGehee, Its Solicitor. The New York, Chicago and St. Louis Railroad Company, by W. J. Stevenson, Its Solicitor. Wabash Railway Company, by L. H. Strasser, Its Solicitor.

[fol. 89] The undersigned hereby acknowledge service of a copy of the foregoing praecipe for record on appeal in the above entitled cause this 20th day of November 1928.

United States of America, by Elmer B. Collins, Special Assistant to the Attorney General. Interstate Commerce Commission, by J. Stanley Payne, Its Solicitor. The Chicago, Rock Island & Pacific Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; St. Louis-San Francisco Railway Company, by Wallace T. Hughes, C. S. Burg, H. H. Larimore, M. G. Roberts, Their Solicitors.

[fol. 90] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 91] Citation in usual form showing service on United States, I. C. C., et al., filed Nov. 22, 1928, omitted in printing.

[fol. 92] In Supreme Court of the United States

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY AND OF PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed Dec. 10, 1928

The appellants state that the points on which they intend to rely are the following:

1. The lower court erred in denying the motion of said plaintiffs for restitution from the defendant railroad companies upon the reversal by the Supreme Court of the United States of the former decree of the District Court dismissing the bill of complaint herein.

2. The lower court erred in denying the motion of said plaintiffs for said restitution and for reference to a master to ascertain the amounts due to the several plaintiffs in restitution from the several defendant railroad companies.

3. The lower court erred in denying the motion of plaintiffs for reference to a master to ascertain the amounts of restitution due the several plaintiffs from the several defendant railroad companies.

4. The lower court erred in denying the motion of plaintiffs for the ascertainment of the amounts due said plaintiffs, respectively, from said defendant railroad companies, respectively, and for restitution of said several amounts.

[fol. 93] 5. The lower court erred in denying the motion of plaintiffs for an accounting or other appropriate proceeding for the ascertainment of the amounts due the said several plaintiffs from the said several defendant railroad companies and for an order of restitution of said several amounts.

6. The lower court erred in failing to enter such order or orders with respect to restitution herein as was and is according to right and justice and the laws of the United States.

The appellants state that the following parts of the record are necessary for the consideration of said points, and therefore designate them as the parts of the record to be printed by the Clerk of said Supreme Court of the United States:

All of said record filed herein with the exception of the appendix to Exhibit 3 of the bill of complaint of the plaintiffs (appellants), said appendix consisting of an alphabetical list of railroads beginning with folio 47 on page 38 of the pamphlet constituting the first part of said record, and including page 55 thereof.

Morison R. Waite, Theodore Schmidt, Frederic D. McKenney, Attorneys for Appellants.

[fols. 94 & 95] Acknowledgment of Service

The undersigned hereby acknowledge service of a copy of the foregoing statement of points to be relied on and parts of record to be printed, on or before the fifteenth day of December, A. D. 1928; said record having been filed in said Supreme Court on the first day of December, A. D. 1928.

United States of America, by Elmer B. Collins, Special Assistant to the Attorney General. Interstate Commerce Commission, by J. Stanley Payne, Its Solicitor. The Chicago Rock Island & Pacific Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, by M. E. Roberts, H. P. Larmon, C. S. Burg, Wallace T. Hughes, Their Solicitors.

[fol. 96] [File endorsement omitted]

Endorsed on cover: File No. 33,872. N. Illinois D. C. U. S. Term No. 563. The Baltimore and Ohio Railroad Company; William W. Wheelock and William G. Bierd, Receivers, etc., et al., Appellants, vs. The United States of America, Interstate Commerce Commission, The Chicago, Rock Island & Pacific Railway Company, et al. Filed December 1st, 1928. File No. 33,872.

Office Supreme Court, U.
FILED
FEB 16 1929
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 563

BALTIMORE & OHIO RAILROAD COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES ET AL., APPELLEES.

ON APPEAL FROM THE THREE-JUDGE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

APPELLANTS' REJOINDER TO APPELLEES' REPLY TO STATEMENT OF GROUNDS OF JURISDICTION.

MORISON R. WAITE,
THEODORE SCHMIDT,
FREDERIC D. McKENNEY,
Attorneys for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 563

BALTIMORE & OHIO RAILROAD COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES ET AL., APPELLEES.

ON APPEAL FROM THE THREE-JUDGE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

APPELLANTS' REJOINDER TO APPELLEES' REPLY TO STATEMENT OF GROUNDS OF JURISDICTION.

In support of their assertion that the three-judge court below (U. S. Dist. Court, Ill., Eastern Division) was without jurisdiction to decree an accounting and restitution in the instant case and consequently this honorable Court is without jurisdiction to entertain

this (second) appeal which is based upon the unexplained refusal of said three-judge court to grant such relief, appellees argue that, under the Act of October 22, 1913 (38 Stats., ch. 32, p. 208, 219—See U. S. Code, Title 28, Sec. 47 and 47*a*), the jurisdiction of the three-judge court in the instant case was confined: (*a*) "to either entering an order enjoining, suspending or annuling the action of the Interstate Commerce Commission, or refusing to enter such an order; (*b*) that appellants' damages, if any, arose from compliance on appellants' part with the order of the Commission and not from the action of the District Court; and (*c*) that issuance by the District Court of an order for restitution would have necessitated determination by that court of the question as to which lines ought reasonably to pay the bridge tolls at St. Louis, Missouri, a matter peculiarly for determination by the Commission itself (Appellees' Reply to Appellants' Statement of Grounds of Jurisdiction, p. 3 and 4).

Considering these argumentative suggestions in their order, we submit:

(*a*) That the suggested limitation on the jurisdiction of the three-judge District Court cannot be reconciled with pertinent provisions of the statute establishing the United States District Courts and defining their jurisdictional powers:

Title 28, Sec. 41, U. S. Code (Judicial Code, sec. 24), as amended, declares that such district courts have original jurisdiction

> "(28) of cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission;—"

While Sec. 45 (Judicial Code, sec. 209) prescribing the method to be followed in invoking the jurisdiction of district courts in cases brought under subdivision 28, above quoted, contains a final provision that

> "In all other respects the practice and procedure shall conform as nearly as may be to that in like cases in a district court of the United States."

By way, apparently, of further precaution, section 46 of U. S. Code, Title 28, specifically declares that

> "Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States,"

while Section 47, by denying the right of district judges, sitting alone, in certain instances to exercise the powers previously conferred upon them, in a negative fashion sets forth the composition of the three-judge district court and the method and necessity for calling it into operation.

While its field of operation is much less general than that occupied by the single judge court, nevertheless, within its prescribed and limited field of action, its judicial powers are no whit less.

Whatever the single judge court might do in affording merited relief at large, the three-judge court may do in appropriate circumstances, and the final judgments and decrees of the latter in cases brought either to enforce or enjoin orders of the Commission, when brought before the Supreme Court of the United States on appeal by an aggrieved party, may be affirmed, reversed or modified as the case may require.

In the instant case the Interstate Commerce Commission, at the instance of the present appellees, constituting the so-called West Side Lines, ordered the appellants now here, constituting the so-called East Side Lines, to cease and desist, and thereafter to abstain from, requiring the so-called West Side Lines "to bear the charges for transfer services from East St. Louis, Ill., to St. Louis, Mo., on westbound freights passing through both points on combination rates which are the same on St. Louis as on East St. Louis," and on or before a day fixed to file and post and thereafter maintain on such westbound freights:

> "the practice of bearing or absorbing on such traffic the charges for transfer services from"

said East Side Lines to said West Side Lines.

It was to avoid such charges for transfer services, so imposed upon them by said order of the Interstate Commerce Commission, that appellants brought their suit in the proper District Court to enjoin enforcement of said order (R. 1-41), and it was alone the erroneous action and decree of said District Court in dismissing said suit "for want of equity" (R. 50), which decree was reversed *in toto* by this Honorable Court (R. 52), that necessitated the absorption by appellants of the transfer charges whose accounting and restitution was asked under the mandate of this Court (R. 52, 53).

Though the district court found that appellants East Side Lines, from and after the 11th day of December, 1926 (the effective date of the order of the Commission which was three days subsequent to the date of the Dis-

trict Court's action erroneously decreeing appellants' bill of complaint to be dismissed for want of equity (R. 50), "bore, absorbed and paid, and are now bearing, absorbing and paying, the charges for transfer services * * * on westbound freight traffic" passing through the points and upon the rates specified, and set aside its earlier decree of dismissal and perpetually enjoined the Commission and appellees, West Side Lines, from seeking to enforce the Commission's complained-of order which became effective as above, and retained jurisdiction of the cause for further proceedings and decrees respecting restitution, costs and other proper matters, "according to right and justice and the laws of the United States" (R. 56), it thereafter, without opinion or reasons given, "decreed that the motion of plaintiff (appellants here) for restitution and for a reference to a Master be and the same is hereby overruled and denied" (R. 57).

Appealable finality of such decree would seem to be apparent. That the presiding Circuit Judge (Anderson) of the three-judge District Court considered it to be both final and appealable would seem to be evidenced by his formal order allowing appeal, fixing and approving appeal bond, directing preparation and forwarding to this Court of a transcript of the record (R., pp. 59-61).

Since *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219-221; *Arkadelphia Milling Co. v. St. Louis-Southwestern R. Co.*, 249 U. S. 134, 145-146; and *Re Lincoln Gas and Electric Light Co.*, 256 U. S. 512, 517, it would seem futile to dispute either the power or the duty of

a United States District Court, in a proper case and when acting upon the mandate of an appellate court to direct restitution of moneys or goods paid over by reason of compliance with its own erroneous decree.

In such a case the three-judge court is equally empowered and no less obliged by duty than is the single-judge tribunal. What the latter could and in the circumstances should do, the former also may be looked to and expected to do, for under the mandate of this Court it was commanded to take such further proceedings "as according to right and justice and the laws of the United States ought to be had" (R. 52).

(*b*) In view of what is said above, it seems unnecessary to prolong this paper by repeating that, but for the error of the District Court in dismissing appellants' bill of complaint, which error was corrected by the decree and mandate of this Court, these appellants would not have been damaged and now be out of pocket because of enforced compliance with the Commission's ill-advised order. It was the failure of the three-judge District Court to properly interpret the applicable law that directly caused the damage of which appellants now complain, and for redress of which they can apply nowhere else than here.

(*c*) The suggestion referable to this letter, to effect that the decreeing of restitution in favor of appellants by the District Court in effect would have constituted a determination of the regulatory matter as to whether the East Side or the West Side Lines should properly bear and discharge the burden of the transfer charges

on westbound freights at East St. Louis is without substance, and, in any event, should not occasion discussion at this stage of the proceedings, for, conceding that such question primarily would be one for determination by the Interstate Commerce Commission, it must be clear that on the motion for restitution no question as to which lines eventually might be required to pay the transfer charges was before the court, but only the duty of restoring the parties then before it to the position and condition which would have been theirs if no error of judgment had been committed on the hearing of the Bill of Complaint.

It may be that when the appellees, the so-called West Side Lines, properly shall apply to the Commission for a ruling upon any supposed inequality or injustice inflicted upon them because of the manner in which such charges on traffic crossing the Mississippi River are divided, that some *practice* differing from that which now obtains may be prescribed, but until proceedings in such aspect shall have been set on foot, appellants are justly entitled to the maintenance of the position in which, after two full hearings before this Court, they have been left by this Court's opinions and decrees.

It is well known that, under the Act to Regulate Commerce, as Amended, the Commission has power to prescribe divisions on past moved traffic only for the period subsequent to the filing of a complaint or petition before it (Act Sec. 15, par. 6).

Appellants have no such complaint or petition on file, and appellees, West Side Lines, do not even pre-

tend to point to any provision of the Act to Regulate Commerce which, in the absence of such, supposedly empowers the Commission to determine the question as to which lines should have borne the transfer charges during the period which has elapsed since the Commission's order of 1926, now enjoined.

In this connection, attention well may be called to the fact that in its opinion filed in this case (277 U. S. adv. pt. p. 291) this Court found that there was a strong presumption that the general level of the rates of the West Side Lines had been adjusted to include reasonable compensation for the services performed by them; that the Commission itself had found that the West Side Lines had long acquiesced in the division of revenue derived from traffic moving on joint rates; and that they have not by tariff provisions attempted to limit to St. Louis their St. Louis-West St. Louis rates when used in combination to move through traffic.

Upon the whole, it is respectfully submitted that jurisdiction to entertain this appeal has been established.

MORISON R. WAITE,
THEODORE SCHMIDT,
FREDERIC D. McKENNEY,
Attorneys for Appellants.